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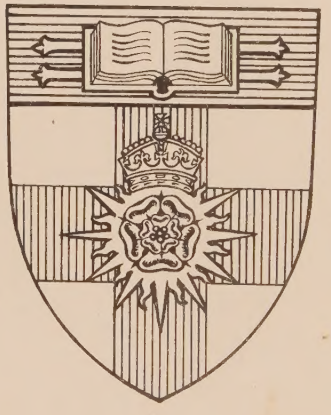

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LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1894. 1895.

THE QUEEN *v.* KERSWILL AND ANOTHER, JUSTICES OF TORQUAY. 1894

Oct. 30.

Justices—Summary Jurisdiction—Procedure—Complaint—Information—Order to Pay Cab Fare and Costs—Distress—Imprisonment—"Sum of Money claimed to be due"—Summary Jurisdiction Acts, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35; 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 5, *and Schedule—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 66—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 145.

By s. 66 of the Towns Police Clauses Act, 1847, if any person refuse to pay on demand to any driver of a hackney carriage the fare allowed by the Act, or by-laws made thereunder, such fare may, together with costs, be recovered before a justice as a penalty.

Where justices, on an information in writing, made an order that the defendant should pay a fare and costs, and that in case of non-payment he should be imprisoned in default of a sufficient distress:—

Held, that the order was bad, because the fare was "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879, and was therefore recoverable only in the manner in which "civil debts" are recoverable in a court of summary jurisdiction under s. 35 of that Act.

RULE, calling upon two justices of the borough of Torquay and William Bagwell to shew cause why a writ of certiorari

1894

THE QUEEN v. KERSWILL.

should not issue to bring up and quash an order made by the justices.

Captain De Castro was summoned to appear before the justices to answer the information in writing of William Bagwell, a cabman, charging that he, De Castro, unlawfully refused to pay on demand to Bagwell the fare of 4*s.* allowed by the by-laws of the Torquay Town Council, contrary to the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and the same by-laws made thereunder. (1)

(1) By the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 66, "If any person refuse to pay on demand to any . . . . driver of any hackney carriage the fare allowed by this . . . . Act, or any by-law made thereunder, such fare may, together with costs, be recovered before one justice as a penalty."

By s. 68 the commissioners may from time to time make by-laws for (inter alia) "fixing the rates or fares, as well for time or distance, to be paid for such hackney carriages within the prescribed distance, and for securing the due publication of such fares."

[In the by-laws made by the town council of the borough of Torquay in pursuance of this Act, scales of cab fares by time and distance were set out; and it was provided that the penalty for breach of any of the by-laws should be a sum not exceeding 5*l.*, at the discretion of the justice or justices of the peace by whom the same should be inflicted, to be recovered as directed by the Act.]

By s. 73 the clauses of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), with respect to the recovery of penalties shall be incorporated with this Act.

By s. 145 of the Railways Clauses Consolidation Act, 1845, "Every penalty . . . . imposed by this Act . . . . the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices; and on complaint being made to any justice he shall issue a summons requiring the party complained against to appear before two justices, and . . . . it shall be lawful for any two justices to proceed to the hearing of the complaint . . . . although no information in writing or in print shall have been exhibited before them; and upon proof of the offence . . . . it shall be lawful for such justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty . . . . incurred, as well as such costs attending the conviction as such justices shall think fit."

By ss. 146, 147 it was enacted that if the amount of the penalty and costs were not paid forthwith, such amount should be levied by distress, and in default of sufficient distress the offender might by warrant of a justice be committed to prison for any term not exceeding three months.

Sect. 5 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), specifies the periods of imprisonment which may be imposed by a court of summary jurisdiction under that Act, or under any other Act whether past or future, "in respect of the non-payment of any sum of money adjudged to be paid by a conviction, or in

After the service of the summons upon De Castro, and before it came on for hearing before the justices, he sent 4*s.* to the justices' clerk.

De Castro did not appear at the hearing, and the justices

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respect of the default of a sufficient distress to satisfy such sum."

Sect. 6: "Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction, shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise."

Sect. 35 provides for the recovery of sums declared by the Act to be civil debts, and enacts that an order made by a court of summary jurisdiction for the payment of any such civil debt or of costs shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved that the person making default in payment has, or has had, since the date of the order, the means to pay, and has refused or neglected, or refuses or neglects, to pay the same.

The Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4, repeals the Acts contained in the schedule thereto to the extent mentioned in the third column thereof. By virtue of that repeal, s. 145 of the Railways Clauses Consolidation Act, 1845, is repealed from the words "and on complaint" to the end of the section, and ss. 146 and 147 are wholly repealed.

By s. 5 of the Summary Jurisdiction Act, 1884, "the repeal enacted by this Act shall not take away any jurisdiction of any justices to act summarily in any matter referred to in an enactment hereby repealed, and the Summary Jurisdiction Acts shall, so far as is consistent with the tenor thereof, apply to every proceeding before justices as to which the procedure is wholly or partly repealed by this Act in substitution for the procedure so repealed.

"And . . . it is hereby declared that where by virtue of the repeal enacted by this Act or otherwise any statute authorizing the infliction by any justice or justices of a penalty or fine, either as a sole punishment or as an alternative punishment for imprisonment, provides no method for the recovery of such penalty or fine, ss. 19 and 21 of the Summary Jurisdiction Act, 1848, as amended by s. 21 of the Summary Jurisdiction Act, 1879, shall apply to the recovery of such penalty or fine."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 19 and 21, where a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, it shall be lawful for the justice or justices making such conviction or order to issue a warrant of distress to levy the amount of such penalty, compensation, or sum of money, and in default of a sufficient distress to commit the defendant to prison.

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made an order adjudging that he should pay to Bagwell the amount of the fare and 9*s.* costs, and that in case of non-payment he should be imprisoned for fourteen days in default of a sufficient distress to satisfy the amount he was ordered to pay.

De Castro subsequently paid the further sum of 9*s.*, and this rule was obtained on his behalf to bring up and quash the justices' order.

Sington, for the justices, now shewed cause. The amount of the cab fare is not a sum "deemed to be a civil debt" within s. 6 of the Summary Jurisdiction Act, 1879. It is recoverable not on complaint, but on information, and is a penalty payable under a conviction for the offence dealt with by s. 66 of the Towns Police Clauses Act, 1847, namely, refusing to pay on demand the proper fare. Before the repeal of the provisions of the latter part of s. 145 of the Railways Clauses Consolidation Act, 1845, and of ss. 146 and 147, the refusal to pay was clearly treated as an offence punishable, on conviction, by imprisonment in default of distress, and the repeal, which is effected by the Summary Jurisdiction Act, 1884, brings the case within the 2nd operative clause of s. 5 of that Act; so that ss. 19 and 21 of the Summary Jurisdiction Act, 1848, apply, and give the justices power to act by distress, and by imprisonment in default of a sufficient distress. The authorities shew clearly that where a statute, or a by-law made under statute, imposes a duty and provides a punishment, either by fine or imprisonment, for breach of that duty, a criminal offence is thereby created: *Cattell* v. *Ireson* (1); *Bancroft* v. *Mitchell* (2); *Mellor* v. *Denham* (3); *Reg.* v. *Whitchurch.* (4) In *Reg.* v. *Paget* (5) the penalty imposed by s. 103 of the Railways Clauses Consolidation Act, 1845, for travelling in a railway carriage without having paid the fare was held not to be "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879. That

(1) 27 L. J. (M.C.) 167.
(2) Law Rep. 2 Q. B. 549.
(3) 5 Q. B. D. 467.
(4) 7 Q. B. D. 534.
(5) 8 Q. B. D. 151.

decision applies here. The justices, therefore, had jurisdiction to make the order of which the defendant complains.

[He also referred to *Reg.* v. *Justices of Tynemouth.* (1)]

A. B. Shaw, for the defendant, in support of the rule. This case is brought within s. 6 of the Summary Jurisdiction Act, 1879. The amount which the justices ordered the defendant to pay was "a sum claimed to be due and recoverable on complaint to a court of summary jurisdiction," and was, therefore, recoverable only in the manner provided by s. 35. It might have been recovered on complaint, and s. 145 of the Railways Clauses Consolidation Act, 1845, provided that it should be so recovered. The words "and not on information" are not used in their exact legal sense; they refer to proceedings on information upon which a conviction may result, as distinguished from proceedings which result in a mere order to pay, and this distinction runs through all the Summary Jurisdiction Acts (see observations of Lindley, L.J., in *Kennard* v. *Simmons and Others.* (2)) *Reg.* v. *Master* (3) is an authority that a sum may be a civil debt though it is recoverable as a penalty. Here the sum claimed is recoverable by the cabman himself: it is not in the category of fines or penalties imposed for criminal offences. The second clause of s. 5 of the Summary Jurisdiction Act, 1884, does not apply to cases which are brought within s. 6 of the Summary Jurisdiction Act, 1879.

MATHEW, J. I am of opinion that this rule should be made absolute. The discussion to-day has been for the most part academical, because the money ordered by the justices to be paid has been paid, and the application to quash their order seems to have been made through mere sensitiveness. The order complained of is in form quasi criminal. The applicant was summoned before the justices for non-payment of a cab fare. He did not appear before the justices, but sent the amount of the fare. The justices ordered him to pay a certain sum for costs, and their order subjected him to imprisonment, in default of distress, in case of non-payment. He paid the costs, and now

(1) 16 Q. B. D. 647. (2) 50 L. T. (N.S.) 28, at p. 29.
(3) Law Rep. 4 Q. B. 285.

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protests against the form of the order. The matter relates to one of the common transactions of life, which are not ordinarily the subject of criminal proceedings. We have to determine whether the order could properly be made. Sect. 66 of the Towns Police Clauses Act, 1847, provides that "if any person refuse to pay on demand to any proprietor or driver of any hackney carriage the fare allowed by this . . . . Act, or any by-law made thereunder, such fare may, together with costs, be recovered before one justice." Up to that point the section seems clearly to be dealing with a civil debt, and to provide means to obtain payment of that debt where payment has been refused upon demand, in which case the cabman is entitled to apply to the magistrate to direct payment. The fare which constitutes the debt is ascertained, and nothing is payable beyond it except costs. But it is said that the last words of the section, "as a penalty," stamp the non-payment with a criminal character. The words are, "to be recovered as a penalty"—that is, to be recovered in the same way as a penalty. Those words do not, in my opinion, alter the nature of the obligation itself, which remains a purely civil obligation, to be enforced either by going to the county court or by applying to a magistrate. Then comes the Railways Clauses Consolidation Act, 1845, which by s. 145 treats the amount as a penalty by providing that "every penalty . . . . may be recovered by summary proceeding before two justices," upon a complaint, although no information in writing or in print shall have been exhibited before them; and ss. 146 and 147 provided that penalties should be levied by distress, and that, in default of distress, any justice might order the offender to be imprisoned. So the matter stood until the passing of the Summary Jurisdiction Act, 1879. Sect. 5 applies to cases of conviction only, and provides imprisonment for the non-payment of sums of money adjudged to be paid by a conviction. It is clearly, I think, not applicable to such a case as the non-payment of a cabman's fare. Sect. 6, however, appears to be clearly applicable. [The learned judge read s. 6.] The words "where a sum of money claimed to be due is recoverable," &c., are a description of the case here: they are clearly applicable to it, and to the debt in question. The

words "and not on information" need not be acted upon because, as has been pointed out, the Railway Clauses Consolidation Act, 1845, did not require an information. I think, although it is not necessary to decide the point, that those words are intended to exclude cases where an information is either required by statute or is the only mode of commencing the proceedings. They seem to me to apply in cases where an information is indispensable. I think that the Summary Jurisdiction Act, 1884 (which repealed the provisions of the Railways Clauses Consolidation Act, 1845, with respect to the procedure for the recovery of penalties), has no bearing on this case. The object of the Act of 1884 was to provide for procedure where the repeal of the Acts mentioned in the schedule would have left no statutory mode of proceeding. It does not apply to the cases contemplated by s. 6 of the Summary Jurisdiction Act, 1879, in respect of which cases that section does provide a mode of proceeding. I am, therefore, of opinion that the order of the justices, which appears to have been made and drawn up under s. 5 of the Act of 1879, was an improper order, and that it must be quashed.

CHARLES, J. I am of the same opinion. I think that on the true construction of s. 66 of the Towns Police Clauses Act, 1847, this is a civil debt, and that, although that section says it may be recovered as a penalty, its essential character is thereby in no way altered. It is clear that the mere statement in an Act of Parliament that a sum is recoverable as a penalty does not turn the non-payment of what is merely a debt into an offence. The authority for that is to be found in *Reg.* v. *Master.* (1) One has, then, to ascertain how the sum of money in question here is to be recovered, and we are thrown back to the Railways Clauses Consolidation Act, 1845, which provides that it may be recovered on complaint; that it may be levied by distress, and in default of a sufficient distress that the person from whom it is recoverable may be imprisoned. In that state of things the Summary Jurisdiction Act, 1879, was passed. Sect. 5 has reference to the period of imprisonment which may be inflicted for non-payment of any sum of money adjudged to be paid by a conviction, or on

(1) Law Rep. 4 Q. B. 285.

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default of a sufficient distress to satisfy any such sum. Sect. 6 is directed to the remedy in the case of non-payment of a mere sum "claimed to be due." Where such sum "is recoverable on complaint to a court of summary jurisdiction, and not on information," it shall "be deemed to be a civil debt," &c. I am of opinion that the sum of money here is clearly within the words "a sum of money claimed to be due," and therefore I should be clear that s. 6 applied to this case but for the difficulty of the words of exclusion, "and not on information." Here the amount of the fare was claimed on an information, and the justices acted on that information in making their order. It is difficult to affix a satisfactory meaning to those words of exclusion—especially when one considers that, as judges have pointed out, "information" and "complaint" are words which connote each other. But I think it is tolerably clear that the words, "and not on information," were inserted to emphasize the exclusion of criminal matters from the operation of s. 6. It is not necessary to say that those words have no meaning. They are an amplification of the previous part of the clause, and are intended to emphasize the declaration that a sum of money claimed to be due, and recoverable before a court of summary jurisdiction, is really a civil debt which can be recovered only as a civil debt in the manner prescribed by the Act. Another difficulty was suggested as arising under the Summary Jurisdiction Act, 1884. That statute has cleared away, by repealing, so much of the Railways Clauses Consolidation Act, 1845, as authorized a distress, and imprisonment in default of a sufficient distress, leaving unrepealed only the first part of s. 145, which enacts that every penalty may be recovered by summary proceeding before two justices. It was argued that the second clause of s. 5 of the Act of 1884 necessarily throws us back to Jervis' Act, whereby justices are authorized to issue a distress warrant, and to imprison in default of sufficient distress. But that, in my opinion, is not the meaning of the second clause in s. 5 of the Act of 1884. It has no application here, because it only applies where, in consequence of the repeal effected by the Act, no method exists of recovering the sum of money or penalty. Here we have the Act of 1879, which does provide a method.

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Therefore, it seems to me that, though the first clause of s. 5 of the Act of 1884 removes a difficulty, the second has no application, because a method for the recovery of the sum in question is provided by the Summary Jurisdiction Act, 1879.

I am, therefore, of opinion that this rule to quash the justices' order should be made absolute.

Rule absolute.

Solicitors for the justices: *Brownlow & Howe, for T. C. Lindop, Torquay.*

Solicitors for the defendant: *Rye & Eyre.*

W. A.

SCOTT, APPELLANT *v.* BOULD, RESPONDENT.

1894

Nov. 2.

Mine—Coal Mines Regulation Act, 1887*—General Rules—Examination of Machinery, &c.—Report of Result of Examination—Record of Report—* 50 *&* 51 *Vict. c.* 58, *s.* 49, *r.* 5.

By the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 5, a competent person appointed for the purpose shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, &c., in mines, and shall, once at least in every week, examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination, and every such report shall be recorded in a book to be kept for the purpose:—

Held, that this rule requires a report to be recorded of the examination directed to be made once in every twenty-four hours, as well as of that directed to be made once in every week.

CASE stated by the stipendiary magistrate of Wolverhampton.

An information was preferred by the appellant, an inspector of mines, charging that—the respondent being the owner of a colliery which was a coal mine within the meaning of the Coal Mines Regulation Act, 1887 (1)—the competent person ap-

(1) 50 & 51 Vict. c. 58. By s. 49, rule 5, "A competent person or competent persons appointed by the owner, agent, or manager, for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, and the state of the headgear, ropes, chains, and other similar appliances of the mine which are in actual use both above ground and below ground, and shall once at least in every week examine the state of the shafts by which persons ascend or descend; and shall make a true report

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pointed did not record in the book kept in the mine for the purpose the result of his examination of the guides and conductors in the shafts of the mine.

The magistrate held that rule 5 of the General Rules in s. 49 of the Act did not require the result of the examination of the external part of the machinery, &c., made every twenty-four hours, to be recorded, but only the weekly examination, and dismissed the information.

The question for the opinion of the Court was whether the result of the examination set out in the information ought to be recorded.

Henry Sutton, for the appellant. The magistrate has taken an incorrect view of the meaning of the Act, for the words requiring the result of the report to be recorded apply equally to the daily and the weekly examinations. Under the repealed Act (35 & 36 Vict. c. 76, s. 51, r. 29) the examination of the guides and conductors was to be made weekly; by the present Act it is to be made daily. This alteration cannot affect the liability to record the result. These provisions are enacted to secure safety to life and limb, and should be strictly enforced.

The respondent did not appear.

MATHEW, J. I am of opinion that the decision of the magistrate was wrong, and that he ought to have convicted, and the case must go back to him with the intimation of our opinion to that effect. The true meaning of rule 5 of s. 49 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), is that the result of the examination in each case shall be recorded. That rule provides that a competent person shall, once at least in

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of the result of such examination, and every such report shall be recorded without delay in a book to be kept at the mine for the purpose, and shall be signed by the person who made the inspection."

By s. 50 contravention of or non-compliance with any of the general rules is an offence against the Act; and, in case of contravention or non-compliance by any person, the owner is guilty of an offence, unless he proves that he has taken all reasonable means, by publishing, and to the best of his power enforcing, the rules, to prevent it.

Sect. 59 imposes penalties for offences against the Act.

every twenty-four hours, examine the state of the external parts of the machinery, &c., and shall once at least in every week examine the state of the shafts by which persons ascend or descend. The rule then goes on as follows: "and shall make a true report of the result of such examination, and every such report shall be recorded," &c. This seems to me to direct that he shall, once at least in every twenty-four hours, make the examination first directed to be made, and shall make a report of the result, which report shall be recorded, and shall also, once at least in every week, make the examination secondly directed, and shall make a report of the result, which report shall be recorded. The words "the result of such examination" apply to both the examinations, both to that which is to be made daily, and to that which is to be made weekly. In other words, "each such examination" is what is meant. It follows that the result of this examination ought to have been recorded, and the respondent was liable to a penalty for neglecting to cause it to be recorded.

CHARLES, J., concurred.

Case remitted to the magistrate.

Solicitor for appellant: *The Solicitor to the Treasury.*

P. B. H.

1894
Oct. 31.

SWEET *v.* SWEET.

Husband and Wife—Separation—Covenant to pay Annuity—Deed without Trustee—Covenant by Wife not to molest, annoy, or interfere—Adultery by Wife—Action for Arrears of Annuity—Right of Wife to recover—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.

By a separation deed, executed by husband and wife alone, without a trustee, the husband covenanted to pay an annuity to the wife, and she covenanted not to molest, annoy, or interfere with him. There was no *dum casta* clause.

In an action by the wife against the husband to recover arrears of the annuity:—

Held, that the plaintiff could maintain the action, and her adultery, resulting in the birth of a child, afforded no defence.

APPEAL by the defendant from the Brompton County Court.

The action was brought by a married woman against her husband to recover a sum of 4*l.* 6*s.* 8*d.* under a covenant in a deed of separation, executed by the husband and wife alone, without a trustee, by which the defendant covenanted to pay to the plaintiff 52*l.* a year by monthly instalments. The deed contained a covenant by the plaintiff not to molest, annoy, or interfere with the defendant; but there was no clause that the annuity should be paid only while the plaintiff remained chaste. The defence relied on was that the plaintiff had been guilty of adultery, resulting in the birth of a child.

The deputy judge, before whom the case was tried, gave judgment for the plaintiff for the amount claimed, with leave to appeal.

Oswald, Q.C. (*S. W. Lambert*, with him), for the defendant. The deputy judge held that the plaintiff was entitled to recover by reason of the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and on the authority of *Fearon* v. *Earl of Aylesford*. (1) That case, however, is distinguishable, for there the action was by the trustee under the deed, to whose claim the wife's misconduct could be no answer, whereas here there is no trustee. A married woman can contract with her husband only with reference to her separate property, or with

(1) 14 Q. B. D. 792.

regard to the compromise of matrimonial offences: *Palliser* v. *Gurney* (1); *McGregor* v. *McGregor*. (2) To allow the wife to recover under such circumstances as the present would be contrary to public policy.

[CHARLES, J. It seems to me that the Married Women's Property Act, 1882, renders the intervention of a trustee unnecessary.]

That is so only in the two cases already referred to, namely, contracts with reference to separate property or matrimonial offences. In all the cases relied on in support of the plaintiff's claim there has been a trustee under the deed: *Seagrave* v. *Seagrave* (3); *Jee* v. *Thurlow* (4); *Baynon* v. *Batley* (5); *Besant* v. *Wood* (6); *Gandy* v. *Gandy*. (7)

In the present case the wife has covenanted not to molest, annoy, or interfere with her husband. These words are wider than the word "molest" alone, so that the case is distinguishable from *Fearon* v. *Earl of Aylesford* (8), and the plaintiff's misconduct affords an answer to her claim.

[He also referred to *Sullivan* v. *Sullivan*. (9)]

Montague Lush, for the plaintiff, was not called on.

MATHEW, J. I am of opinion that the judge in the Court below arrived at a right conclusion, and the appeal ought to be dismissed. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 2, provides that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," &c. The obvious meaning of this clause is that a married woman is only to be liable to the extent of her separate property, and not, as has been argued, that her contracts must be confined to dealings with her separate estate. It is contended on behalf of the appellant that it is against public policy to prepare a deed of separation

(1) 19 Q. B. D. 519.
(2) 20 Q. B. D. 529; affirmed 21 Q. B. D. 424.
(3) 13 Ves. 439.
(4) 2 B. & C. 547.
(5) 8 Bing. 256.
(6) 12 Ch. D. 605.
(7) 7 P. D. 168.
(8) 14 Q. B. D. 792.
(9) 2 Addams, 299.

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between husband and wife without appointing a trustee. Mr. Oswald says that it makes all the difference as to the validity of such a deed whether a trustee is appointed or not, and he seeks to distinguish the decision of the Court of Appeal in *Fearon* v. *Earl of Aylesford* (1) on the ground that in that case there was a trustee under the deed. It was not on that ground that *Fearon* v. *Earl of Aylesford* (1) was decided. Long before that case, according to the decision in *Jee* v. *Thurlow* (2), adultery by the wife was held to afford no answer to an action for arrears of an annuity payable under a separation deed. In giving judgment in *Fearon* v. *Earl of Aylesford* (1) the Master of the Rolls said: "If this point were now for the first time to be decided, I myself should absolutely refuse to say that owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, or after any effluxion of time, public policy requires that—whatever may have been the temptation under which the woman has succumbed—the husband shall not be obliged to pay to her the annuity, which he has undertaken to pay to her without any such condition being expressed. But there is more than that. It seems to me that that point has been decided in England for many years, for if ever there was such a doctrine in our law, it must have existed during the whole of that time; and yet it has been again and again overlooked. If that argument be true, the clause, which is often put into such deeds by the most expert conveyancers, was an absolutely futile and senseless clause, namely, the clause that the annuity shall be paid only while the wife remains chaste. Therefore authority and principle seem to me to shew that there is no such doctrine as that as to public policy, which has been vouched in order to take away the effect of this deed." (3) These observations are altogether inconsistent with the present appellant's contention that this deed is contrary to public policy, and therefore that point fails.

Another point was raised, founded on the use of the word "annoy" in the wife's covenant; but I cannot distinguish that word from "molest," and it is clear from *Fearon* v. *Earl of*

(1) 14 Q. B. D. 792. (2) 2 B. & C. 547.
(3) 14 Q. B. D. at p. 799.

Aylesford (1) that adultery is not molestation within the meaning of such a covenant as this.

CHARLES, J. I am of the same opinion. The main argument on behalf of the appellant is based on the absence of a trustee, and it is contended that a married woman cannot contract by such a deed as this without the intervention of a trustee. It is clear on the authorities that a contract such as this is one which a husband and wife may lawfully enter into. The case of *Besant* v. *Wood* (2) is a conclusive authority as to this point. The question now raised is whether, in the present state of the law, a trustee is absolutely essential to the wife's right to recover on the husband's covenant in such a deed as this. The Married Women's Property Act, 1882, has conferred the right to sue on a wife, and therefore I am of opinion that as to this point the appeal fails.

It was also contended that the word "annoy," which occurs in the wife's covenant in this deed, is wider in its signification than the word "molest," but as to that point I am of opinion that the decision in *Fearon* v. *Earl of Aylesford* (1) is conclusive.

Appeal dismissed.

Solicitors for plaintiff: *Windybank, Samuels, & Behrens.*
Solicitor for defendant: *Churchill.*

(1) 14 Q. B. D. 792. (2) 12 Ch. D. 605.

P. B. H.

C. A.
1894
Nov. 7.

[IN THE COURT OF APPEAL.]

RENDELL AND OTHERS *v.* GRUNDY.

Practice—Discovery in aid of Execution—Judgment Debtor ordered to be examined—Conduct Money—Order XLII., *r.* 32; *Order* XXXVII., *r.* 9—*Attachment—Irregularity—Copies of Affidavits not served with Summons—Waiver—Order* LII., *r.* 4; *Order* LXX., *r.* 1.

A judgment debtor, for whose examination an order has been made under Order XLII., r. 32, though entitled to a reasonable sum for conduct money, does not come within Order XXXVII., r. 9, and therefore is not entitled under that rule to the "like conduct money and payment for expenses and loss of time as upon attendance at a trial in court."

On an application by the plaintiffs at chambers for leave to issue a writ of attachment against the defendant for disobedience of an order of the Court, the defendant's solicitor took the objection that copies of affidavits, on which the application was founded, had not been served with the summons in accordance with Order LII., r. 4. The judge thereupon offered to adjourn the further hearing until the following day, in order that the defendant might have an opportunity of answering the affidavits: and it was adjourned accordingly. The affidavits were shewn to the defendant's solicitor, who subsequently attended at the adjourned hearing, and admitted that the defendant could not answer the affidavits. The judge then made the order for an attachment:—

Held, assuming that the provisions of Order LII., r. 4, applied and that there had been an irregularity, nevertheless, by reason of what subsequently happened, the defendant, having accepted what was equivalent to the advantages intended to be conferred by the provisions of the rule, was not entitled to insist on the irregularity, and the order for an attachment was rightly made.

APPEAL from an order of Wright, J., giving leave to the plaintiffs to issue a writ of attachment against the defendant for disobedience of an order of the Court.

The facts, so far as material, were as follows:—

The plaintiffs having recovered judgment in the action, which was for costs due to them as solicitors, against the defendant, who was a surveyor, and such judgment remaining unsatisfied, an order was made against the defendant under Order XLII., r. 32, for his oral examination before a master as to his property or means of satisfying the judgment. The attachment was applied for on the ground of his disobedience of this order under the following circumstances. It appeared that, on attending before

the master upon an appointment for his examination, the defendant objected to be examined on the ground that the conduct money which had been given to him, viz. 1*s.*, was insufficient, and that, as a surveyor, he was entitled to a guinea for conduct money and expenses under Order XXXVII., r. 9. The plaintiffs offered him a further sum of 4*d.* The master held that the sum of 1*s.* 4*d.*, being sufficient to cover his railway and omnibus fare from Lewisham, where he resided, to the Royal Courts of Justice, was under the circumstances of the case a reasonable sum for conduct money, and accordingly overruled the objection. The defendant nevertheless refused to be examined, stating, however, that he had no wish to defy the Court, and, if on appeal his contention was overruled, he was willing to be examined.

It appeared that copies of the affidavits, on which the application at chambers for an attachment was founded, were not served on the defendant with the summons. The defendant's solicitor, who appeared for him before the judge at chambers, objected on that ground to the application. The learned judge thereupon offered to adjourn the case till the following day in order that the defendant might have an opportunity of answering the affidavits: and it was adjourned accordingly. The affidavits were shewn to the defendant's solicitor, and, on the further hearing on the next day, he admitted that the defendant could not make any affidavit in answer to them. The learned judge then made the order for a writ of attachment.

George Wallace, for the defendant. A judgment debtor attending for examination under Order XLII., r. 32, comes within Order XXXVII., r. 9. It was held in *Protector Endowment Co.* v. *Whitlam* (1), under the former rules, which were in terms similar to those of the present, that the judgment debtor was entitled to his expenses as a witness attending to give evidence in such a case as this, and, if such expenses were not tendered to him, he would not be attached for non-compliance with the order. Order XXXVII., r. 9, is no doubt one of a series of rules under the heading "Examination of Witnesses"; but the words of the rule are, "any person required to attend for the purpose of being

(1) 36 L. T. 467.

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examined." It is submitted that these words clearly cover the case of a judgment debtor attending for examination under Order XLII., r. 32. The defendant was, therefore, entitled to expenses on the scale applicable to professional men, viz., to a guinea.

Secondly, the application for an attachment ought not to have been granted, because no copies of the affidavits were served with the summons. Order LII., r. 4, provides that, where any motion for an attachment "is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." It is submitted that that rule must be taken to apply where the application is by summons at chambers as well as where the application is by motion in Court. It was held by Kekewich, J., in *Taylor* v. *Roe* (1), that the failure to serve copies of the affidavits with the notice of motion for an attachment is an irregularity which is not waived by reason of the defendant's having subsequently seen the affidavits and answered them, and that the Court ought not to condone such an irregularity under Order LXX., r. 1, on the ground that applications affecting the liberty of the subject are matters strictissimi juris.

[LORD ESHER, M.R. The decisions in the Chancery Division on this subject appear to be somewhat conflicting.]

J. D. Crawford, for the plaintiffs. Order XXXVII., r. 9, applies to a person who attends to be examined as a witness, not to a person who is examined as a judgment debtor under Order XLII., r. 32, in aid of execution upon a judgment which he has not satisfied. It was held, no doubt, in *Protector Endowment Co.* v. *Whitlam* (2), that a judgment debtor was entitled in such a case to a reasonable sum of money to defray his expenses in coming to and returning from the examination; but the decision is no authority for the contention that a judgment debtor, for whose examination an order has been made under Order XLII., r. 32, is a witness within the meaning of Order XXXVII., r. 9. The master has determined that the sum of 1*s.* 4*d.*, which was enough to cover the defendant's railway and omnibus fare, was under the circumstances of the case sufficient, and the Court will not

(1) 68 L. T. 213.

(2) 36 L. T. 467.

review his decision on the question of fact. It is to be observed that the defendant's contention is really, not that a reasonable sum was not allowed, but that he is entitled as of right to the sum of one guinea, as if he were a professional witness at a trial.

With regard to the second point, the defendant's solicitor accepted the adjournment for the purpose of considering whether the defendant could answer the affidavits, and, having seen the affidavits, he stated that he could not do so. The defendant has, therefore, had in substance all the advantages that the rule was intended to secure to him. And that being so, even assuming that there was an irregularity in the first instance, it has been waived, and no objection on that ground ought now to be entertained.

George Wallace, in reply.

LORD ESHER, M.R. In this case the judgment debtor was a surveyor. A judgment having been recovered against him, he was summoned under Order XLII., r. 32, to appear before a master at chambers to give the judgment creditors certain information to which they were by law entitled. On appearing before the master he took the objection, though he was not summoned to give evidence as a witness on somebody else's business, but on his own business as a judgment debtor who had made default in paying the judgment debt, that as a surveyor he was entitled to a guinea for conduct money and expenses and loss of time as if he were a witness called at a trial. The plaintiffs' contention, on the other hand, is not that he is not entitled to any conduct money, but that he is only entitled to a reasonable sum for conduct money. If that be so, who is to determine what is a reasonable sum? The master here considered that question, which is one of fact, and he decided that it was reasonable that the defendant should have what it cost him to travel to and fro between his residence and the courts. I suppose the master came to the conclusion that he had not incurred any other expense, and that it was not reasonable under the circumstances that he should be compensated for loss of time, or have anything more than expenses out of pocket. The master, therefore, held that a sum which would cover his

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railway and omnibus fare was under the circumstances of the case a reasonable sum for conduct money. The contention for the defendant is, that the case comes within Order XXXVII., r. 9. I am of opinion that that contention is wrong. That rule appears to me to be applicable to the examination of witnesses, not to the examination of a judgment debtor under Order XLII., r. 32. I think that it is right to say that, under the latter rule, the debtor is entitled to a reasonable sum for conduct money. The question what, under the circumstances of the case, is a reasonable sum is eminently one for the discretion of the master, and one which he has better means of determining than the Court; and I do not think that the Court ought in this case to interfere with the exercise of his discretion.

The second point taken for the defendant was that he was entitled to have copies of the affidavits to be used upon the application for an attachment served upon him with the summons. I am inclined to think that he was so entitled. Assuming that to be so, what is the object of serving such copies? Why, obviously that he may have an opportunity of answering the matters in the affidavits so far as he can. That, as a matter of good sense and business, is the substance of the provision; anything else is a mere question of form. The defendant's solicitor appeared before the judge, and objected that copies of the affidavits had not been served. Thereupon the judge offered to adjourn the hearing that the defendant might see whether he could answer the affidavits. That adjournment was accepted; the affidavits were shewn to the defendant's solicitor; and he stated, on the further hearing, that the defendant could not answer them. Every purpose for which the law as to service of copies of the affidavits was made has been satisfied. The defendant has not been injured in the smallest degree by what has taken place. I am prepared to say that, under the circumstances of this case, though the defendant might be entitled to have copies of the affidavits served upon him with the summons, and that has not been done, yet, having been offered what was exactly equivalent, and having accepted it, he cannot afterwards set up this objection to the application for an attachment. He has in reality had everything to which he was entitled, and

therefore I do not think we ought to entertain this objection. If Kekewich, J., meant, in the case of *Taylor* v. *Roe* (1), to say that, whatever may have happened subsequently, the mere fact of failure to serve copies of the affidavits with the summons or notice of motion is necessarily and in all circumstances fatal to the application for an attachment—which I do not believe—I must say that I do not agree with him. For these reasons I think the appeal must be dismissed; but, as the defendant has stated that, if the Court decides against him, he will attend and be examined, we will not immediately issue the attachment, but will give him three days within which to attend before the examiner. If he fails to attend within that time, the writ may be issued without further application.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Church, Rendell, Todd & Co.*
Solicitor for defendant: *H. S. Bridge.*

E. L.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

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Nov. 27.

GLAMORGAN COUNTY COUNCIL *v.* GREAT WESTERN RAILWAY COMPANY.

Practice—Costs—Counsel's Fees—Costs of Three Counsel—Taxation—Railway and Canal Commission.

Where costs are awarded upon an application to the Railway and Canal Commissioners, the costs of more than two counsel will not be allowed on taxation between party and party, unless the case involves extraordinary complication and difficulty, and is one in which a reasonable and prudent man, acting with ordinary prudence, would not go into Court without three counsel.

In applying this latter test, the chance of counsel being absent should not be taken into consideration; but it should be assumed that all the counsel employed can attend throughout the hearing.

The rule laid down by Fry, J., in *Kirkwood* v. *Webster* (9 Ch. D. 239) explained.

APPEAL by the defendants from the decision of the Registrar of the Railway and Canal Commission, refusing to allow the costs of three counsel on taxation between party and party.

(1) 68 L. T. 213.

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GLAMORGAN COUNTY COUNCIL v. GREAT WESTERN RAILWAY CO.

An application had been made by the Glamorgan County Council to the Railway and Canal Commissioners for an order directing the Great Western Railway Company to afford facilities for passenger traffic over a certain line of railway. The case was heard on April 17, 18, and 19, 1894, before the Commissioners (Collins, J., Sir Frederick Peel, and Viscount Cobham), who, on April 19, gave judgment, unanimously dismissing the application of the county council with costs. (1) The railway company were represented at the hearing by two Queen's counsel and a junior, and on taxation the registrar allowed the costs of two counsel only.

Ernest Moon, for the defendants, the Great Western Railway Company, in support of the appeal. The case is one in which the costs of three counsel ought to be allowed. It is admitted that, in order to establish this proposition, exceptional circumstances must be shewn; but such circumstances exist here. There are three main considerations to be taken into account—the importance of the issues from a legal point of view, the commercial importance of the case, having regard to the amount at stake, and the complexity of the questions of fact involved: *Kirkwood* v. *Webster* (2); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3) All these elements are to be found in the present case. The case was, in the words of Fry, J., in *Kirkwood* v. *Webster* (2), "one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel." The railway company estimated the expense of what the applicants sought to compel them to do at over 60,000*l.*, and were prepared with a body of evidence, which, from the turn the case took at the hearing, it became unnecessary to put before the Court. That this evidence ought to be taken into consideration on taxation is clear from the judgment of Kekewich, J., in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3) [He also referred to *Darlaston Local Board* v. *London and North Western Ry. Co.* (4)]

(1) See now 57 & 58 Vict. c. 54, s. 2 (passed August 25th, 1894), restricting the power to award costs.

(2) 9 Ch. D. 239.

(3) 60 L. T. (N.S.) 753.

(4) [1894] 2 Q. B. 694.

Henry Sutton, for the Glamorgan County Council. The employment of three counsel in such a case as the present is "an unusual expense," which ought not to be allowed on taxation, according to the judgment of Lord Esher, M.R., in *In re Broad.* (1) *Kirkwood* v. *Webster* (2) is distinguishable; for there a number of charges of fraud were put forward, and the facts were very complicated. The judgment of Malins, V.C., in *Smith* v. *Buller* (3), where the authorities are reviewed, supports the view taken by the registrar. He has exercised a discretion, which ought not to be overruled. As to the alleged importance of the questions of law involved, the argument on behalf of the county council really only amounted to an endeavour to escape from the effect of the decision in *South Eastern Ry. Co.* v. *Railway Commissioners* (4), which the Court held to be conclusive.

Ernest Moon replied.

COLLINS, J. I am of opinion that this appeal ought to be dismissed. I do not deny that very important questions, both of law and of fact, were involved in the case as it was first presented to the Court at the hearing; but the question of law is not very complicated when once the facts are ascertained, nor are the facts in themselves very complicated. A question such as that which is raised on the present appeal must depend very much on the discretion of the registrar, and he goes much more in detail into the facts and evidence than the Court can. The Court cannot know what materials were laid before counsel in their briefs, as the registrar does. Applying the standards which are suggested in the decisions, I cannot find that this case comes within any of them. *Pearce* v. *Lindsay* (5) was a case of extraordinary complication. It was there contended that because only two counsel had been employed in the Court below, the costs of three could not be allowed on appeal; but in delivering judgment Lord Campbell, L.C., said: "We do not know for what reason not more than two counsel were then"—that is, in the Court below—"employed, nor what effect the severe labour they undertook may have produced upon them." Knight

(1) 15 Q. B. D. 420.
(2) 9 Ch D. 239.
(3) Law Rep. 19 Eq. 473.
(4) 6 Q. B. D. 586.
(5) 1 D. F. & J. 573.

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Bruce, L.J., added: "I also think the counsel employed upon the original hearing were overweighted." That certainly was not the case here. *Kirkwood* v. *Webster* (1), which was most relied on for the appellants, is also distinguishable from the present case, for there the trial commenced on July 2nd and continued until the 7th, when the plaintiff abandoned his case, and there were no less than eight distinct charges of fraud and misrepresentation made by the plaintiff against the defendant. Under those circumstances Fry, J., allowed the costs of three counsel, saying: "I think that the case falls within the rule laid down by Turner, L.J., in *Pearce* v. *Lindsay* (2), and that it was essentially necessary for the purpose of doing justice that three counsel should be employed. I do not speak of a physical or a mathematical necessity, but I think that the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel." As I interpret this statement, in considering how a reasonable and prudent man would act, the registrar must eliminate the chance whether all the three counsel, if three are employed, will or will not attend during the whole of the hearing, and must deal with the case on the supposition that all three are able to attend throughout. In the present case I remember that all three counsel did not attend throughout the hearing. I think that in order to justify the employment of three counsel the case must involve extraordinary complication and difficulty, and judged by that standard this case fails. If judged by the standard applied by Kekewich, J., in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3), it equally fails. For these reasons, I am of opinion that the registrar was right in disallowing the costs of a third counsel, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *R. R. Nelson.*

Solicitors for respondents: *Cunliffe & Davenport, for Richard Wyndham Williams, Cardiff.*

(1) 9 Ch. D. 239. (2) 1 D. F. & J. 573.
(3) 60 L. T. (N.S.) 753.

P. B. H.

TAYLOR *v.* THE QUEEN. 1894

Oct. 27, 29.

Criminal Law—Practice—Pleading—Indictment—Receiving Goods knowing them to have been obtained by False Pretences—Sufficiency without Statement of Nature of Pretence—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 95.

An indictment under s. 95 of the Larceny Act, 1861, for receiving goods, knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the receipt of the goods with knowledge that they had been unlawfully obtained by some false pretence, it is sufficient to allege this, without specifying the nature of the pretence.

ARGUMENT of a writ of error on demurrer to the 3rd and 4th counts of an indictment.

The 1st count charged one Farrell with obtaining from one Clarke certain meat, the property of Clarke's master Peel, by certain false pretences, which were specified and set out in the count.

The 2nd count was similar to the 1st, except that it alleged the meat to have been obtained from Peel.

The 3rd count charged that the plaintiff in error, Taylor, "227 lbs. of beef, 12 lbs. of suet, 41 lbs. of mutton, and 2¼ lbs. of ox kidneys" (which was the meat mentioned in the 1st and 2nd counts), "of the goods and chattels of the said George Walter Peel, then lately before unlawfully, knowingly, and designedly obtained from the said Joshua Clarke by false pretences, unlawfully did receive and have, he the said George Taylor, at the time when he so received the said beef mutton suet and kidneys as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said Joshua Clarke by false pretences."

The 4th count was in similar terms to the 3rd, except that it alleged the goods to have been obtained from Peel.

At the quarter sessions at Portsmouth Taylor demurred to the 3rd and 4th counts. The Court overruled the demurrer, and Taylor was tried and convicted. A writ of error was issued, and it was assigned as error that in the 3rd and 4th counts (on which Taylor was convicted) the false pretences were not set

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out by means of which it was alleged that the articles of food therein mentioned were unlawfully obtained, and also that the false pretences by means of which it was in the 3rd and 4th counts alleged that the articles of food were unlawfully obtained were not in the said counts stated to be those by means of which Farrell was in the 1st and 2nd counts alleged to have obtained the said articles of food. (1)

C. W. Mathews, (*Guy Stephenson*, with him), for the plaintiff in error. The conviction is bad, for the 3rd and 4th counts of the indictment are insufficient in not setting out the false pretences by which the goods are alleged to have been obtained, and there is no sufficient averment in the 3rd and 4th counts to identify the pretences referred to in those counts with the pretences set out in the 1st and 2nd counts. It is as essential to set out the false pretences relied on in an indictment under s. 95 for receiving as it is in an indictment under s. 88 for obtaining by false pretences. It is necessary to set out the false pretence in order to shew that it amounts to an indictable false pretence in law. It might prove to be a pretence in the nature of a promise, which would not be indictable. The defendant is entitled to be informed what the false pretences alleged are. The contention of the plaintiff in error is supported by authority: *Rex* v. *Mason* (2); *Reg.* v. *Wilson* (3); *Reg.* v. *Hill* (4); *Reg.* v. *Goldsmith* (5), per Bramwell, B.; *Reg.* v. *Ball.* (6)

Temple Cooke, (*G. Taylor Warry*, with him), for the prosecution.

(1) By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 88: "Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour."

By s. 95: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanour by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanour, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanour shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice."

(2) 2 T. R. 581.

(3) 2 Moody C. C. 52.

(4) 2 Russell on Crimes, 482, note (f), 5th ed.

(5) Law Rep. 2 C. C. 74.

(6) Central Criminal Court Sessions Papers, vol. cxviii. p. 879.

The 3rd and 4th counts follow the words of s. 95 of the Larceny Act, 1861, and are therefore sufficient. The cases relied on for the plaintiff in error are distinguishable. *Reg.* v. *Hill* (1) cannot be treated as an authority; and what Bramwell, B., said in *Reg.* v. *Goldsmith* (2) is no more than the expression of a doubt. The universal practice, and all the precedents that can be found, support the contention on behalf of the Crown, and the following authorities are to the same effect: *Rex* v. *Gill* (3); *Sydserff* v. *The Queen* (4); *Reg.* v. *Rymes* (5); *Reg.* v. *Aspinall.* (6)

Guy Stephenson, replied.

MATHEW, J. I am of opinion that our judgment must be for the Crown. The indictment is for receiving goods which have been obtained by false pretences knowing that the goods have been obtained by false pretences. The indictment is drawn following the words of the Act (24 & 25 Vict. c. 96, s. 95), and the question for our determination is whether the particular false pretence by which the goods were obtained need be set out. It is objected that the indictment is defective on account of the absence of a statement of the nature of the false pretence, and we have to determine whether that objection ought to prevail. For many years it has been the practice in indictments such as this not to set out the particular false pretences by which the money or goods are alleged to have been obtained. It is said on behalf of the plaintiff in error that the alleged false pretence might turn out to have been a pretence of a promissory nature, and if that were so it would not be a false pretence in law, for which an indictment would lie; but the answer to this argument is that the indictment alleges that the goods were unlawfully obtained by false pretences, and that means that they were obtained by means of what is in law a false pretence. On behalf of the plaintiff in error reliance was placed on the case of *Reg.* v. *Hill.* (1) That decision is not reported; but the effect of it is stated in Russell on Crimes to be that, before 24 & 25 Vict.

(1) 2 Russell on Crimes, 482, note (f), 5th ed.
(2) Law Rep. 2 C. C. 74.
(3) 2 B. & A. 204.
(4) 11 Q. B. 245.
(5) 3 C. & K. 326.
(6) 1 Q. B. D. 730; affirmed 2 Q. B. D. 48.

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c. 96, an indictment for receiving goods knowing them to have been obtained by false pretences must have alleged the false pretences in the same manner as an indictment for obtaining the goods by false pretences; and in the note it is stated to have been so decided at the Gloucester Spring Assizes, 1851, by Mr. Greaves, Q.C., after consulting Patteson and Talfourd, JJ., who were both very clearly of opinion that the indictment was bad. It does not, however, appear whether there was any formal discussion of the point. The other authority relied on for the plaintiff in error is *Reg.* v. *Goldsmith.* (1) In that case it was objected that an indictment for unlawfully receiving goods knowing them to have been obtained by false pretences was bad, because it did not set out the false pretences; but the Court for Crown Cases Reserved held that after verdict the indictment was good. It is true that Bramwell, B., said in the course of the case: "Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good" (2); but he did not so decide, and he agreed that it was good after verdict. That is the whole of the authority cited to support the contention that this indictment is bad. I am of opinion that it is not enough to compel us to come to the conclusion that the allegation of the false pretence is not sufficient. It is necessary to consider what the gist of the offence is—it is that the defendant unlawfully received goods with the knowledge that they had been unlawfully obtained by some false pretence, and this is sufficiently stated. The judgment of the Court of King's Bench in *Rex* v. *Gill* (3) supports this view. In that case the defendants were found guilty upon an indictment charging them with conspiring "by divers false pretences and subtle means and devices" to obtain money, and it was held, on motion in arrest of judgment, that, the gist of the offence being conspiracy, it was sufficient to state that fact and its object, and not necessary to set out the specific pretences. Abbott, C.J., said: "The indictment appears to me sufficient. The gist of the offence is the conspiracy; and although the nature of every offence must be laid with reasonable certainty, so as to apprise the defendant

(1) Law Rep. 2 C. C. 74. (2) Law Rep. 2 C. C. at p. 79.
(3) 2 B. & A. 204.

of the charge, yet I think that it is sufficiently done by the present indictment. It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law should require the particular means to be set forth. The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy. I think, therefore, that no sufficient ground has been stated for arresting the judgment." Bayley, J., said: "I am of the same opinion. When parties have once agreed to cheat a particular person of his monies, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete. . . . It is, therefore, not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence." The judgment of Holroyd, J., is to the same effect. The reasoning of that case applies to the present. It is not necessary for the prosecution to shew that the accused person knew by what false pretence the goods were obtained.

CHARLES, J. I agree with the judgment which has been delivered. I think the 3rd and 4th counts are both good, on the ground that they state with reasonable certainty the offence with which the plaintiff in error is charged. It is clear from *Rex* v. *Gill* (1) that, if this were a case of conspiracy to obtain goods by false pretences, it would be sufficient to state it so, and it would not be necessary to state the means by which the conspiracy was to be carried out, and the reasons there given are applicable to the present case. Here the gist of the offence is the receipt of goods which have been unlawfully obtained by

(1) 2 B. & A. 204.

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false pretences, knowing that they have been so unlawfully obtained. The rule of pleading which prevails in criminal cases is, that the pleader is bound to allege in the indictment all that it is necessary to prove in order to bring home the offence charged to the person indicted. In the present case, I am of opinion that this has been done. None of the decisions which have been cited are authorities to the contrary. In *Reg.* v. *Wilson* (1) the indictment was clearly defective, for there was no allegation of any false pretence at all. As to *Reg.* v. *Hill* (2), I have nothing to add to what has already been said, for that case is not binding on us. In *Reg.* v. *Goldsmith* (3) it was assumed, for the purpose of the argument, that the indictment would have been insufficient if demurred to, the point decided being that it was good after verdict. Whether it was a good indictment or not I am not sure; but it is to be observed that there was no allegation that the goods had been received by the defendant knowing them to have been *unlawfully* obtained, and the words "unlawfully obtained" occur in the statute. In the present case, I decide on the broad ground that the indictment contains all the allegations which it is necessary to prove in order to bring home the offence charged to the defendant.

Judgment for the Crown.

Solicitor for plaintiff in error: *A. W. Mills, for G. H. King, Portsmouth.*

Solicitors for the prosecution: *Ford & Ford.*

(1) 2 Moody C. C. 52. (2) 2 Russell on Crimes, 482, note (f), 5th ed.
(3) Law Rep. 2 C. C. 74.

P. B. H.

THE QUEEN *v.* PATERSON. 1894 Oct. 31.

Tithes—Redemption Money — Order for Recovery — Jurisdiction of County Court—"Expenses, Rent-charge, or other Sums"—Tithe Act, 1891 (54 & 55 *Vict. c.* 8), *s.* 10, *sub-s.* 4.

Sect. 10, sub-s. 4, of the Tithe Act, 1891—by which, "Any enactment in the Tithe Acts, or in the Extraordinary Tithe Redemption Act, 1886, directing any expenses, rent-charge, or other sums, to be recovered as tithe rent-charge, shall . . . . be construed to refer to the recovery of tithe rent-charge under this Act"—applies to redemption money, and therefore the county court has jurisdiction, under s. 2 of the same Act, to make an order for the recovery of redemption money.

An order had been made that the judge of the county court of Essex holden at Southend, and William Clarke, should shew cause why the county court judge should not hear and determine the matter of an application on behalf of Harvey Mair Grellier, the valuer appointed pursuant to the provisions of the Tithe Commutation Acts in the matter of the redemption of the tithe rent-charge on certain lands.

The application was for an order for the recovery of 59*l.* 13*s.* 2*d.*, the proportion of the consideration money and expenses incident to the redemption, alleged to be due in respect of lands of which Clarke was alleged to be the owner and occupier, and that the order for recovery be executed by the appointment of an officer to distrain under the Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 2, sub-s. 2.

The county court judge held that he had no jurisdiction to make an order for the recovery of redemption money, and dismissed the application.

S. T. Evans, for the respondent Clarke, shewed cause. The county court judge was right in holding that he had no jurisdiction, for the Tithe Act, 1891 (54 & 55 Vict. c. 8), contains no provision giving him power to make an order for the recovery of redemption money. If it had been intended to confer such jurisdiction, there would have been an express provision to that effect. The applicant relies on s. 10, sub-s. 4, which makes applicable the enactments in the Tithe Acts "directing any

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expenses, rent-charge, or other sums to be recovered as tithe rent-charge"; but this does not apply, for "other sums" must be something ejusdem generis with tithe rent-charge, which this redemption money is not.

C. A. H. Black, (*W. Willis, Q.C.*, with him), in support of the order. The county court judge has jurisdiction. Sect. 2 of the Tithe Act, 1891, provides for the recovery of tithe rent-charge in the county court, and the effect of s. 10, sub-s. 4, is to make applicable to the recovery of this redemption money the provisions of the Tithe Acts there referred to, amongst others 23 & 24 Vict. c. 93, s. 39, and 2 & 3 Vict. c. 62, s. 18. Redemption money is clearly ejusdem generis with expenses and rent-charge.

MATHEW, J. This is an application for an order directing the judge of the county court at Southend to hear and determine an application under the Tithe Act, 1891 (54 & 55 Vict. c. 8), for the recovery of redemption money. The learned judge refused to deal with the case on the ground that he had no jurisdiction. Whether he had jurisdiction or not depends on s. 10, by which "(4.) Any enactment in the Tithe Acts or in the Extraordinary Tithe Redemption Act, 1886, directing any expenses, rent-charge, or other sums to be recovered as tithe rent-charge, shall, as respects any sum becoming due after the passing of this Act, be construed to refer to the recovery of tithe rent-charge under this Act, save that the owner of the lands shall not be entitled to obtain any remission under this Act." Under this sub-s. 4 tithe rent-charge is recoverable, and the contention on behalf of the applicant is that redemption money is recoverable in the same way by virtue of the words, "expenses, rent-charge, or other sums to be recovered as tithe rent-charge." I am of opinion that this redemption money is recoverable, and that the learned county court judge was in error in holding that he had no jurisdiction. The Act of 1860 (23 & 24 Vict. c. 93), s. 39, provides how the expenses of redemption money are to be recoverable, by reference to the Acts there recited. We must go back to the recited Acts to find out what was in the contemplation of the legislature. By 2 & 3 Vict. c. 62, s. 18, payment of expenses of apportionment or other expenses which may be

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ordered to be paid may be enforced under the provisions of the Acts there recited. It is clear that expenses of apportionment could be recovered by distress under those Acts, and the money which is sought to be recovered in the present case is of a similar nature. I do not refer to any other point which may come before the county court judge, but merely decide that the learned judge has jurisdiction over redemption money.

CHARLES, J., concurred.

Order absolute.

Solicitors for applicant: *Wordsworth, Blake & Co.*
Solicitors for respondent: *Rollit & Sons.*

P. B. H.

PILBROW, APPELLANT; THE VESTRY OF THE PARISH OF ST. LEONARD, SHOREDITCH, RESPONDENTS.

1894
Nov. 1.

Metropolis—Management Acts—"Drain"—"Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

The appellant was owner of buildings, consisting of forty-six sets of apartments, divided into two blocks separated by a causeway twenty feet wide, which opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway; the only access to the other being from the thoroughfare. In the causeway was a dust-bin for the common use of the occupiers of both blocks. The premises were drained by means of branch drains running from the sets of apartments into a main drain which ran into a sewer within one hundred feet of the blocks:—

Held, that the main drain was "used for the drainage of premises within the same curtilage," and was therefore a "drain," and not a "sewer," within the meaning of s. 250 of the Metropolis Local Management Act, 1855; so that the appellant was liable to pay the expenses of works of alteration and amendment done to such drain by the vestry of the parish.

CASE stated by one of the metropolitan police magistrates under the Summary Jurisdiction Acts.

The appellant appeared before the magistrate to answer a summons obtained by the clerk to the vestry of the parish of St. Leonard, Shoreditch, the respondents, to recover from the appellant expenses, amounting to 209*l.* 7*s.* 6*d.*, incurred by the vestry, as sanitary authority for the parish, in necessary works of cleansing,

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alteration, and amendment of drains at Norfolk Buildings, situate in such parish.

The following facts were proved or admitted at the hearing before the magistrate, or admitted when the case came before the Divisional Court:—

The appellant was in receipt of the rents and profits of certain dwellings, called "Norfolk Buildings," in the parish of St. Leonard, Shoreditch.

The buildings consisted of forty-six sets of apartments divided into two blocks, which were separated by a causeway twenty feet wide. The causeway opened to a public thoroughfare. The entrance, as to one of the blocks, was from the causeway; as to the other, the only access was from the thoroughfare. In the causeway was a dust-bin used in common by the occupiers of the dwellings in both blocks.

The buildings were erected and the drains put in by the owner in 1882 without any plans having been submitted to the local authority, or any inspection or sanction of the drains by them.

The drainage was by means of twelve branch drains running north and south from each set of apartments into a main drain running east and west under the causeway into a sewer within 100 feet of the blocks. The main drain was a single nine-inch pipe. The branch drains were inserted into the main drain through holes cut in that pipe.

No order of the vestry had ever been made for draining either of the blocks by a combined operation.

In November, 1891, the inspector of nuisances appointed by the vestry gave a separate notice in writing, in respect of each block, to the appellant to forthwith do certain specified works of alteration and amendment to the main and branch drains; and that if the owner neglected or refused to comply with that notice the vestry would cause the specified works to be done, and recover the expenses from the owner in the manner provided by the Metropolis Local Management Acts.

The requisitions of the notices were not complied with, and the works specified were ultimately done by the vestry at the cost of 209*l.* 7*s.* 6*d.* That sum was demanded of the

appellant, and payment not having been made, the summons was issued.

The magistrate decided that, having regard to the provisions of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), as to the construction and maintenance of drains and sewers, the alleged main drain in question draining blocks of houses by a combined operation was a "drain," and not a "sewer," within the meaning of the Act. (1) He therefore held that the appellant was liable to pay the sum claimed by the vestry, as being the expenses duly and reasonably incurred by them, and made an order upon the appellant for payment thereof.

The question for the opinion of the Court was, whether the magistrate's decision and determination was correct in point of

(1) By s. 74 of 18 & 19 Vict. c. 120: "If it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist or be about to be constructed within one hundred feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation."

By s. 82: The surveyor or inspector of a vestry or district board may inspect any drain, &c., within their parish or district.

By s. 85: "If, upon such inspection as aforesaid, any drain . . . appear to be in bad order and condition, or to require cleansing, alteration, or amendment . . . the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises."

By s. 250: "The word 'drain' shall mean and include any drain of, and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain,' interpreted as aforesaid, applies."

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law; and, if not, what should be done, or ordered by the Court, in the premises.

Richard Woodfin, for the appellant. On the facts stated in the case and admitted, that which is called the "main drain" is not a "drain" but a "sewer" within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and is vested by the Act in the vestry, who are charged with the duty of repairing it. Though passing through private ground it receives the drainage of more than one building, and is therefore a sewer: per North, J., in *Bateman* v. *Poplar District Board of Works* (1); *Travis* v. *Uttley*. (2) No order has been made by the vestry for draining the blocks of buildings by a combined operation; so that the part of the definition of "drain" which refers to drainage by a combined operation does not apply.

Finlay, Q.C. (*Lewis Thomas*, with him), for the respondents. The two blocks of buildings and the causeway are within the same curtilage, and therefore the drain in question is "used for the drainage of premises within the same curtilage" within the meaning of s. 250. If they are not within the same curtilage the appellant had no power to make the combined system of drainage without the order of the vestry, and his wrongful act could not have the effect of making the drain a sewer which the vestry became liable to repair. If the vestry consented to the combined system, their consent was equivalent to an order, and the case is brought within the definition of "drain."

Richard Woodfin, in reply. The buildings are not within the same curtilage. As to one block, there is only access to it from a public thoroughfare; and the causeway which separates the blocks is a "street" within s. 250, which enacts that "'street' shall apply to and include any . . . . lane, footway, square, court, alley, passage, whether a thoroughfare or not." Buildings which are separated by a street cannot be within the same curtilage.

MATHEW, J. I am of opinion that our judgment should be for the respondents. I think the magistrate's decision was

(1) 33 Ch. D. 360. (2) [1894] 1 Q. B. 233.

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right. The question is, whether that to which his order applies is a "drain" or a "sewer" within the meaning of s. 250 of the Metropolis Local Management Act, 1855. [The learned judge read the definitions of the words "drain" and "sewer" in s. 250.] According to the statement of the case there are two blocks of buildings having between them what is described as a causeway, which, I should conclude, is a paved yard used for the purposes of both blocks, and having in it a dust-bin common to the occupiers of both blocks. Is that a yard within the curtilage of both buildings? I think that it is. In Stroud's Judicial Dictionary, p. 174, "curtilage" is described as "a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, a little croft, or court or place of easement, to put in cattle for a time, or to lay in wood, coal, or timber, or such other things necessary for household." This yard is to get rid of something unnecessary for the household, namely, the dust. The author then refers to *Marson* v. *London, Chatham and Dover Ry. Co.* (1) and *Commissioners of Inland Revenue* v. *Goodfellow.* (2) In Jacobs' Law Dictionary the description of "curtilage" is "a court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house," and Jacobs refers to 4 Edw. 1, c. 1, and other statutes. The statute which is so frequently referred to at quarter sessions—7 & 8 Geo. 4, c. 29—enacts that "no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of burglary," unless there is a communication between them. I have no doubt, therefore, that this yard is within the curtilage of both buildings; and, that being so, the drain in question comes within the very words of the definition in s. 250. I am of opinion that the expenses incurred by the vestry ought to be paid by the owner of these two blocks of houses having this courtyard between them for their common convenience.

CHARLES, J. I am of the same opinion. The premises in question seem to me to be within the same curtilage. Upon that short ground I think the magistrate was right. It is said

(1) Law Rep. 6 Eq. 101. (2) 45 J. P. 588.

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Charles, J.

that the definition of "street" in s. 250 prohibits us from holding that these two blocks of buildings with the open space between them were within the same curtilage. I do not agree with that argument. No doubt "street" has, for various purposes of the Act, been given an artificial meaning; but the definition was not intended to affect the construction of that part of the interpretation clause which deals with drains. I am of opinion that our judgment should be for the respondents.

Judgment for the respondents.

Solicitor for appellant: *S. E. Lane.*
Solicitor for respondents: *H. M. Robinson.*

W. A.

C. A.
Nov. 12.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* JUSTICES OF ESSEX.

Poor-rate—Appeal—Assessment Committee as Respondents—Consent of Guardians of Union—Costs of Respondents — Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 2.

By s. 2 of the Union Assessment Committee Amendment Act, 1864, the assessment committee of a union to which the Union Assessment Committee Act, 1862, applies may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to an appeal to special or quarter sessions against a poor-rate made for any parish contained in the union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given.

An assessment committee, with the consent of the guardians of the union, appeared as respondents in an appeal to quarter sessions. In subsequent appeals, based on the same valuation, and entered and respited at quarter sessions to abide the result of the first appeal, the assessment committee also appeared as respondents, but without obtaining such consent. The appeals were ultimately dismissed, and the appellants were ordered to pay the respondents' costs. On an application for a mandamus to the justices commanding them to order the clerk of the peace to tax the costs of the assessment committee:—

Held, that the assessment committee were not entitled to the costs of any appeal in which they had not obtained the consent of the guardians to their appearing as respondents.

APPEAL from an order of the Divisional Court discharging a rule for a mandamus.

The application to the Divisional Court was for a rule calling on the justices of Essex and the London County Council to shew cause why a writ of mandamus should not issue commanding the justices of Essex to order the clerk of the peace of the county to tax certain costs of the assessment committee of the West Ham Union, out of sessions, in pursuance of an order of quarter sessions. The London County Council were occupiers of certain hereditaments in the parish of West Ham, in the West Ham Union, and they appealed against a rate made upon them. Notice of the appeal was given to the churchwardens and overseers of the parish and to the assessment committee. The appeal was entered at quarter sessions, and respited from time to time, and was ultimately heard and dismissed, but subject to a case stated for the opinion of the High Court. The case was stated and was argued in the High Court, the Court of Appeal (1), and the House of Lords. (2) In the meanwhile eleven other rates had been made, against each of which the London County Council appealed. The appeals were entered as they arose, and were respited from time to time to abide the event of the decision in the first appeal. In the case of the first appeal the assessment committee applied to the guardians of the union, under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), and obtained the consent of the guardians under s. 2 of that Act that the assessment committee should appear as respondents to the appeal. (3)

In all the subsequent appeals the assessment committee received notices of appeal under s. 1 of the Act, and they appeared and consented to those appeals being respited from

(1) [1892] 2 Q. B. 44.

(2) [1893] A. C. 562.

(3) Sect. 2 of the Union Assessment Committee Amendment Act, 1864, enacts: "The assessment committee of such union (a union to which the Union Assessment Committee Act, 1862, applies) may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal (an appeal to special or quarter sessions against a poor-rate made for any parish contained in any such union), but in the name of the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given."

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time to time. After the decision in the House of Lords the London County Council applied at quarter sessions, after notice to the assessment committee, that the eleven other appeals should be dismissed, and an order was made to that effect, the assessment committee appearing and consenting. It was further ordered that the London County Council should "pay the respondents the costs, to be taxed out of sessions." The costs of the churchwardens and overseers, who had also had notice and appeared on each occasion, were accordingly taxed by the clerk of the peace and were paid; but the clerk of the peace declined to tax the costs of the assessment committee on the ground that it had not been shewn that in these appeals they appeared by consent of the guardians. Application was thereupon made to quarter sessions for an order directing the clerk of the peace to tax these costs, but such an order was refused. A rule nisi for a mandamus was thereupon applied for and obtained, but on argument discharged by the Divisional Court.

The assessment committee appealed.

Jelf, Q.C., and *Edward Morten*, in support of the appeal. The assessment committee, who had a wider interest in the appeals than the churchwardens and overseers, were, in fact, respondents in each case, and are entitled to their costs under the order of the court of quarter sessions. They have had notice of all the appeals, and no objection has been taken to their appearing. The order of quarter sessions was made by consent, and the Court cannot go behind it. The appeals are against rates based on the same valuation list, and the real inquiry in each appeal was as to the correctness of that list. The assessment committee obtained authority from the guardians to appear on the first appeal, and it was not necessary to obtain a like authority on the other appeals. In an analogous case under s. 1 of the Act, it has been held that a person need not repeat his application to the assessment committee on every appeal against rates based on the same valuation: *Reg.* v. *Justices of Denbighshire.* (1) Even if it is a condition precedent to the right to costs that application should have been made to the guardians, proof of the

(1) 15 Q. B. D. 451.

fulfilment of the condition may be waived: *Rex* v. *Justices of Hertfordshire* (1); and the facts clearly shew a waiver in this case.

Bosanquet, Q.C., and *Wedderburn*, for the London County Council, were not called on.

LORD ESHER, M.R. In this case the assessment committee went before the clerk of the peace to desire that he, as the officer of the justices, should tax costs which the assessment committee had incurred in eleven appeals. The clerk of the peace said that no costs had been incurred by the assessment committee in those appeals which he had jurisdiction to tax, because, if they appeared before the justices without any authority to so appear, they should not have been heard, and, if there was no legal right to hear them, they did not incur costs which he could, according to law, tax. There are certain conditions which an assessment committee must fulfil before they have any right to be heard, and these conditions are contained in s. 2 of the Act of 1864. We have been pressed with a case which was decided on s. 1; but the two sections are different things, and each must be construed according to the ordinary canons of construction. By s. 2, the assessment committee may appear on an appeal, whether on the argument or when it is entered or respited is immaterial, with the consent of the guardians of the union after notice has been sent to every guardian. Giving to the words of this section their ordinary grammatical construction, it is plain that the assessment committee are not to appear unless or until they have obtained such consent. It lies on them to shew that they have fulfilled the conditions. No consent of the parties can give jurisdiction when the conditions are not complied with. The clerk of the peace was right in requiring proof of the performance of the conditions precedent. Whether he took the objection himself, or adopted it when it was suggested by some one else, it went to the root of his jurisdiction to tax the costs, and as no proof was given he could not tax the costs. It is perfectly clear that no such proof could be given, for the conditions never were complied with, and that the question is not one of dispensing with evidence that they had been

(1) 4 B. & Ad. 561.

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fulfilled. I am therefore of opinion that the appeal must be dismissed.

LOPES, L.J. An appeal against a poor-rate was carried to the quarter sessions. To that appeal there were two sets of respondents—the overseers of the parish and the assessment committee of the union. The case raised an important point, and ultimately came before the House of Lords. Before the case was finally determined a number of appeals were entered and respited, and it is in respect of costs incurred in those appeals that this application is made. The objection taken to the right of the assessment committee to costs is that they have not complied with the conditions precedent imposed by s. 2 of the Act of 1864, which would alone entitle them to appear. No evidence was given of compliance with those conditions, and it was clear that in fact they had not been complied with. It appears to me that the clerk of the peace was perfectly right, and did that which under the circumstances he was bound to do.

It has been argued that the case of *Rex* v. *Justices of Hertfordshire* (1) governs this case; but in my opinion that case affords no ground for saying that the conditions precedent can be dispensed with in the case before us. *Reg.* v. *Justices of Denbighshire* (2), which was also cited, has nothing to do with the present case. It was a decision under s. 1 of the Act. Speaking for myself, I think that case was rightly decided on that section; but has no bearing on the section we are now considering.

I come to the conclusion, therefore, that the decision of the Court below was right and should be affirmed.

RIGBY, L.J. The right of the assessment committee to appear on appeals against poor-rates is a statutory right contained in s. 2 of the Union Assessment Committee Amendment Act, 1864. The right there given depends on the consent of the guardians after notice to each guardian. The only consent that has been obtained by the assessment committee was that they should appear in the first appeal, and there are eleven other appeals to which that consent does not apply. It was said that this con-

(1) 4 B. & Ad. 561. (2) 15 Q. B. D. 451.

dition might be waived, and in support of that contention *Rex* v. *Justices of Hertfordshire* (1) was cited. In that case no statutory provision was waived. The condition there was that a certain notice of appeal should be served, and that notice was served, and the service could have been proved, as appears from the report. The question there was whether, having omitted to ask for formal proof of this fact, they could afterwards say that the statutory condition had not been complied with, and that consequently there was no jurisdiction. Then it is said that in *Reg.* v. *Justices of Denbighshire* (2) it was laid down that to go before the assessment committee once was a sufficient compliance with the statutory condition precedent which is found in s. 1. Supposing that is so, how does it affect this case? We should be holding in direct contradiction to what appears to be the fact if we were to hold that the conditions of s. 2 had been complied with. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for assessment committee: *Hillearys.*
Solicitor for London County Council: *W. A. Blaxland.*

A. M.

IN RE THE COUNTY COUNCIL OF HEREFORDSHIRE AND THE TOWN COUNCIL OF THE BOROUGH OF LEOMINSTER, AND IN RE THE LOCAL GOVERNMENT ACT, 1888.

1894 *Oct.* 30.

Local Government — County Council — County Fund — Borough — Clerks to Borough Justices — Salaries — Fees — "Petty Sessional Divisions" — 12 & 13 Vict. c. 18, s. 1 — Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 140 — *Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 84.

Sect. 84 of the Local Government Act, 1888, has imposed upon a county council the duty of paying the salary of the clerk to the justices of a borough which is within the administrative county, and has a population under 10,000 and a separate commission of the peace; and all fees and costs payable to such clerk, which are not excluded in the fixing of his salary, should be paid into the county fund.

CASE stated for obtaining the decision of the Court, under s. 29 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), as to the powers, duties, and liabilities of the county council for

(1) 4 B. & Ad. 561. (2) 15 Q. B. D. 451.

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IN RE COUNTY COUNCIL OF HEREFORDSHIRE AND TOWN COUNCIL OF BOROUGH OF LEOMINSTER, AND IN RE LOCAL GOVERNMENT ACT, 1888.

Herefordshire with respect to the clerk to the justices of the borough of Leominster.

The borough of Leominster is a borough which, under the census of 1881, had and now has a population of less than 10,000. It is situate wholly within the administrative county of Hereford, and has a separate commission of the peace, but not a separate court of quarter sessions.

The justices of the borough of Leominster, on the death of their clerk in 1891, appointed C. E. A. Moore their clerk at an annual salary of 110*l.*, and requested the Herefordshire County Council to pay such salary out of the county fund, on the ground that under the provisions of the Local Government Act, 1888, the duty and liability of paying the expenses of petty sessions held for the borough of Leominster was transferred to the county council of Herefordshire.

The county council of Herefordshire, being advised that it was doubtful if the liability to pay the expenses of the petty sessions for the borough of Leominster, including therein the salary of the justices' clerk, had been transferred to them under the Local Government Act, 1888, were desirous, before making any such payment out of the county fund, to obtain the decision of the High Court of Justice as to whether they were legally liable to pay the same; and, if they were so liable, whether they could claim to receive from the borough of Leominster the fines and fees received by the clerk to the justices of such borough for business done in petty sessions and under the Summary Jurisdiction Acts.

Since the appointment of C. E. A. Moore in 1891 no salary had been paid to him either by the county council of Herefordshire or the town council of Leominster; but he had retained for his own use all fees received by him.

The questions submitted by the county council of Herefordshire for the decision of the High Court were:—

1. "Is the duty of paying all or any of the expenses of petty sessions held for the borough of Leominster (including therein the salary of the clerk of the justices for such borough) transferred to the county council of Herefordshire by the Local Government Act, 1888?"

2. "Are the fees received by the clerk of the justices of the borough of Leominster, or any of them, for business done in petty sessions or under the Summary Jurisdiction Acts to be paid by the clerk to the account of the borough fund of the borough of Leominster, or of the county fund of the county council of Herefordshire."

Richard Harington, for the county council of Herefordshire. By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 159, "The justices of a borough shall from time to time appoint a fit person to be their clerk, to be removeable at their pleasure"; and by s. 140 and the 5th Schedule, the borough fund shall be applicable to and charged with the payment of the clerk's salary. Those enactments have not been repealed by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 84. (1) The words, "salaried clerks of petty sessional divisions," apply only to clerks to county justices. The same expression is used in the Justices' Clerks Act, 1877 (40 & 41 Vict. c. 43), ss. 5 and 7, which deals with the appointment, qualification, and payment of justices' clerks, and it is used in express contrast to a "clerk to the justices of a borough." It is also used in the same sense in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 48. The expression "local authority" in s. 84 of the Local Government Act, 1888, is not limited to borough authorities. It is used in the preamble to the Justices' Clerks Act, 1877, and is intended to include county as well as borough authorities. Sect. 36 of the Local Government Act, 1888, deals with a borough having a separate commission of the peace, whether it be a quarter sessions borough or not, and provides that, "subject to the provisions of this Act, all such powers,

(1) Sect. 84, sub-s. 1: "The salaried clerk of every petty sessional division shall be from time to time appointed, and removed, as heretofore."

Sub-s. 2: "The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local authority respectively."

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duties, and liabilities of the court of quarter sessions or justices of the borough, as in the case of the county are by this Act transferred to the county council, shall cease, and the county council shall have those powers, duties, and liabilities within the area of the borough in like manner as in the rest of the county." That section, however, has no application, because the liability to pay the clerk to the justices of a borough is a liability, not of the justices, but of the town council; nor does s. 39, which provides for the application of the Act to boroughs, with or without a separate court of quarter sessions, having a population of less than 10,000, take away the liability of the borough authorities to pay the salary of the justices' clerk. In *County Council of Cornwall* v. *Town Council of Truro* (1) the population of the borough was over 10,000, and on that ground the case may be distinguished from this.

Corner, for the town council of the borough of Leominster. The county council are liable to pay the salary of the clerk to the borough justices, and are entitled to receive the fees referred to in s. 84 of the Local Government Act, 1888. The statute 12 & 13 Vict. c. 18, provides for the holding of petty sessions of the peace in boroughs, and enacts by s. 1 that "every sitting and acting of justices of the peace in and for any city, borough, or town corporate having a separate commission of the peace . . . . shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament, already made or hereafter to be made, having relation to such petty sessions, or to any business to be transacted thereat." The petty sessional divisions mentioned in s. 84 of the Local Government Act, 1888, are the same as those mentioned in 12 & 13 Vict. c. 18, and therefore include all boroughs having a separate commission of the peace. Sect. 30, sub-s. 1, of the Act of 1888 provides that there shall be a standing joint committee of the quarter sessions and the county council for the purposes (amongst others) of clerks of the justices; and by s. 126, "all enactments inconsistent with this Act are hereby repealed." It is clear, therefore, that s. 84 makes the county

(1) 63 L. J. (M.C.) 60; 70 L. T. (N.S.) 354.

council liable to pay the justices' clerks salary, and the liability of the town council to pay it under the Municipal Corporations Act, 1882, is taken away. In *Ex parte County Council of Kent and Council of Dover, and Ex parte County Council of Kent and Council of Sandwich* (1), the Queen's Bench Division seems to have been of opinion, with respect to the borough of Sandwich, which was in the same position as Leominster, except that it had a separate court of quarter sessions, that the expenses of quarter and petty sessions were payable out of the county rates; and in *County Council of Cornwall* v. *Town Council of Truro* (2) the point here was expressly decided with respect to a borough having a separate commission of the peace and a population over 10,000.

Richard Harington, replied.

MATHEW, J. In this case I have come to the conclusion that the county council must pay the salary of the clerk to the justices of the borough, and receive the fees referred to in the second question submitted for our opinion. The statute 12 & 13 Vict. c. 18, s. 1, enacts that any sitting or acting of justices of the peace in and for any borough having a separate commission of the peace shall be deemed a petty sessions of the peace, and the district for which the same shall be holden "shall be deemed a petty sessional division within the meaning of any Acts of Parliament, already made or hereafter to be made, having relation to such petty sessions," &c. In 1877 was passed the Justices' Clerks Act, in which enactment the expression "salaried clerk of a petty sessional division" was clearly confined to petty sessional divisions of the county justices. There is, however, nothing in that Act to affect the operation of the 12 & 13 Vict. c. 18. Next came the Local Government Act, 1888, and the question turns upon s. 84. [The learned judge read the section.] I am of opinion that s. 84 was intended to apply to all salaried clerks of all petty sessional divisions, including boroughs having a separate commission of the peace. If there were any doubt upon the question, the final words of s. 84—which provide that "in the enactments relating to such salaries and fees the standing

(1) [1891] 1 Q. B. 389, 725. (2) 63 L. J. (M.C.) 60; 70 L. T. (N.S.) 354.

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joint committee shall be substituted for the quarter sessions justices and the local authority respectively "—are sufficient to remove it. That disposes of this case. I need only add that I believe we are acting in the spirit of the *Truro Case* (1) in coming to this conclusion.

CHARLES, J. I am of the same opinion. The matter becomes abundantly clear when the provisions of 12 & 13 Vict. c. 18, and the Local Government Act, 1888, are considered, and then the difficulties suggested on behalf of the county council, as arising from the Justices' Clerks Act, appear to be without foundation. Upon inspecting that Act it is true that it draws a marked distinction between clerks of petty sessional divisions and clerks to borough justices; but there is nothing in it to force us to the conclusion that in the Act of 1888 the words "salaried clerks of petty sessional divisions" must have the meaning contended for by Mr. Harington. I am of opinion that those words were intended to include clerks to borough justices. The county council ought, therefore, to pay the salary of the clerk of the justices of the borough of Leominster, and the fees received by the clerk mentioned in the second question should be paid to the account of the county fund of the county council of Herefordshire.

Judgment accordingly.

Solicitor for the county council of Herefordshire and the town council of Leominster: *A. Hunt, for Symonds & Son, Hereford.*

(1) 63 L. J. (M.C.) 60; 70 L. T. (N.S.) 354.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1894
Oct. 31.

J. LYSAGHT, LIMITED *v.* COLEMAN.

Insurance (Marine)—Sea Damage to part of Goods Insured—Cost of Examining undamaged Part—Liability of Underwriters.

A cargo of galvanized iron, consisting of a number of cases each containing several sheets of iron, was insured by a policy that warranted the subject-matter of the insurance free from average under 3 per cent., and declared average to be recoverable on each package separately or on the whole. The insurance was from Bristol to London until safely delivered on board export vessels if so forwarded. Some of the iron was damaged during the voyage to London by perils insured against, and the whole was, on arrival in London, landed, unpacked and examined. The examination shewed that the iron in a number of the cases had been damaged to a considerable extent, but that the iron in the other cases was undamaged. The contents of cases in which any iron had been damaged were sold, and the rest of the iron was repacked and forwarded to its destination by the shippers, who claimed from the underwriters the whole expense arising from the unloading of the cargo for examination:—

Held (affirming the judgment of Wills, J.), that the underwriters were not liable to indemnify the assured in respect of the expenses incurred by them in relation to any part of the cargo other than those cases which contained iron that had been damaged by the perils insured against.

MOTION to enter judgment for the plaintiffs.

The action was brought against an underwriter to recover his proportion of the expenses of landing, warehousing, opening, unpacking, examining, and repacking 391 cases of galvanized iron, part of the subject of two policies of marine insurance underwritten by the defendant. The policies were in identical terms and were on "galvanized iron . . . average recoverable on each package separately or on the whole." The insurance was "at and from warehouses at Bristol to London including all risks in transit . . . until safely delivered on board export vessels if so forwarded." Each policy contained the ordinary suing and labouring clause. Certain named goods, not including galvanized iron, were warranted free from average, unless general, or the ship be stranded, and all other goods were warranted free from average under 3*l.* per cent. unless general or the ship be stranded.

The galvanized iron was packed in wooden cases. Each case was lined with felt and held a number of sheets of the iron, the

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felt being folded over the top of the iron and the case then fastened up. There were 497 cases, which were shipped to London by SS. *Shamrock*, their ultimate destination being Australia and New Zealand. On her voyage to London the ship encountered bad weather, and a quantity of sea water got into the hold. On the arrival of the ship in London it was found that nearly all the cases were stained by sea water. Galvanized iron deteriorates rapidly if sea water gets to it, and as some of the iron was found to be damaged the cases were put into lighters and landed at the West India Docks. There all the cases were opened and examined for the plaintiffs by a surveyor, the underwriters being represented at the examination by a surveyor, but without acknowledging any responsibility for expenses incurred relative to undamaged goods. The result of the examination was that the contents of 106 cases were found to be damaged to the extent of 40 per cent. of the value, whilst the iron in the other 391 cases was undamaged. The contents of the 106 cases were sold and the remainder of the iron was repacked and exported by the plaintiffs to New Zealand. With regard to the 106 cases the underwriters paid the depreciation, being the difference between the invoice price, which was the same as the market price of the day, and the auction price. They also paid in respect of these 106 cases the proportionate expenses, that is $\frac{106}{497}$ of the expenses incident to the landing, examination, repacking and delivery of the whole consignment. The plaintiffs, however, claimed to be entitled to the whole of the cost that they had incurred in ascertaining the amount of the damage to the iron, and this action was brought to enforce this claim.

The action was tried at Bristol before Wills, J., who subsequently, on further consideration, directed judgment to be entered for the defendant.

The plaintiffs gave notice of motion to set aside this judgment.

Pyke, Q.C., and *E. U. Bullen*, for the plaintiffs. The provision in the policy that average may be recoverable on each package separately or on the whole is inserted in favour of the assured, and gives him an option: *Hagedorn* v. *Whitmore* (1); Arnould,

(1) 1 Stark. 157.

6th ed. 836, 837; Stevens, 5th ed. 226. There is in this case an insurance of the shipment as a whole and damage to part, and in order to ascertain the amount of the damage it was necessary to examine the whole. This was a reasonable and necessary course to take, and the cost is therefore covered by the indemnity of the insurance: *Smith* v. *Howell.* (1) The case stands on the same footing as that of a sale of goods for the purpose of ascertaining the amount of damage, the costs of which are borne by the underwriters: Arnould, 6th ed. 935; Phillips, par. 1465. The case of *Cator* v. *Great Western Insurance Co. of New York* (2), upon which the learned judge who tried the case relied, is not in point, for it turned on the special terms of the policy, under which the loss was to be estimated by the separation and sale of the part actually damaged. In this case, by the express terms of the policy, the assured has the option of treating the shipment as a whole.

The rule in Phillips on Insurance, par. 1791, is laid down thus: "The charges for ascertaining the amount of the loss should fall upon the party who must have sustained the loss, had its amount been ascertained without any expense," and in this case it must fall on the underwriters. The suing and labouring clause is applicable, as the sea water would have got to the undamaged iron unless the cases had been opened and repacked. The expenses were incurred for the purpose of preventing further damage, and should fall on the underwriters.

Bucknill, Q.C. (with him *English Harrison*), for the defendant. The plaintiffs had an option to treat the insurance as a whole or as on the cases, and they elected to take the latter course, for they sold the damaged portion and sent on the rest. Ascertaining whether there is damage, and ascertaining the amount of damage, are two distinct things, and the plaintiffs are seeking to make the underwriters pay the cost of the former.

[He was stopped.]

Pyke, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiffs shipped at Bristol a cargo of galvanized iron, to be carried to the Thames, and there

(1) 6 Ex. 730. (2) Law Rep. 8 C. P. 552.

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Lord Esher, M.R.

to be delivered to the plaintiffs into barges to be supplied by them, and when this was done the plaintiffs were to take the iron to another ship to be carried to Australia. There were thus to be two transactions in respect of these goods, and the plaintiffs insured them for the voyage, which comprised those two parts. We have to deal with this insured voyage. The ship arrived in the Thames, but during her voyage she met with heavy weather, and that was a peril of the sea which did damage to part of the goods on board. That gave the assured a right against the underwriters. They had insured all the galvanized iron; but the policy contained a paragraph stating that average was recoverable on each package separately or on the whole. I incline to think, though I do not think it is material to our decision, that this was an insurance on the whole cargo and not on separate packages; but I agree that the paragraph I have referred to would give the assured a right when the cargo arrived to say that they would take the loss on each package without relation to the loss on the whole. When the goods arrived the assured, having taken them into their own control, noticed the damage to some of the packages, and considered that it would not be for their interest to send on the goods without examining them. They therefore directed the barges to go to the West India Docks, and there by their order the goods were landed for the purpose of ascertaining what packages contained iron that was damaged, and to what extent. They gave notice to the underwriters, who declined any responsibility for undamaged goods, and left the assured to do their best, which indeed was what they were bound to do; but the underwriters appointed a surveyor to attend the examination on their behalf. The assured examined the packages, and found that 106 of them contained damaged iron, and they separated the whole into two lots, putting all the packages in which some of the iron was damaged on one side, and the remainder on the other side. The former were sold, and the remainder were treated as undamaged goods, and repacked and sent forward to Australia. The assured thus elected to treat the insurance as being on each package, and in respect of those that contained damaged iron they claimed the difference between the invoice price and the net sum that

resulted from the sale. This claim the underwriters allowed, and have paid. The assured were also allowed the cost incurred in respect of those packages, so that in regard to them they have been fully paid. They claim, however, more than this, for they claim the costs incurred by them in respect of the other packages. They must put their claim in one of two ways. One way is to say that the undamaged goods were made of less value because of the damage to the other packages, because thereby they had lost their character and would not sell for so much in the market. If they put their claim in this way, the answer is that it is contrary to the rules of insurance. The only other way to support the claim is to treat it as part of the damage to the damaged portion of the goods. As to this, it is enough to say that it is impossible to make out how the damage to one part of the goods can be affected by the examination of the other part. What the assured did was no doubt a reasonable thing to do in their own interest, but they cannot throw the cost of doing it on the underwriters. The authorities are against the plaintiffs' contention. In Stevens on Average, in part 1, s. 3, art. 10, it is pointed out that the underwriter engages to guarantee the assured against the direct operation of sea damage and not against the consequential results; and the highest that could be said of the claim in this case is that it was in respect of damage which was a consequential result of the sea peril, and it is very doubtful whether that could be justly said. The evidence which was given at the trial as to the practice of average adjusters in such cases shews that what was done in this case was in accordance with the practice, so that authority and practice are both against the plaintiffs. As to other arguments in support of the plaintiffs' case it is quite impossible to say that what was done here was to save loss to the underwriters, and I think I ought to say also that it is clear that the insurance was on the iron, so that no claim could arise in respect of damaged packing-cases. The decision of the learned judge must therefore be supported, and the appeal dismissed.

Lopes, L.J. The Master of the Rolls has so fully dealt with the case that I have only a few words to say with regard to it.

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The cargo consisted of 497 cases of galvanized iron, and when they arrived in London it was discovered that 106 contained iron that had been damaged, while the contents of the remainder were sound. The plaintiffs claim with respect to the undamaged portion to be entitled to the money expended in examining those 391 cases. It appears to me that there is a short answer to this contention to be found on looking at the policy. The thing insured against is actual damage by perils of the sea, and there has been no actual damage to the contents of these cases. The underwriters do not guarantee that the goods when they arrive shall be free from suspicion of damage, and the most that can be said of these goods is that there was a suspicion that they might have been damaged. That is a matter in respect of which the assured are not entitled to recover.

With regard to the suing and labouring clause, it cannot be successfully contended that any of the expenditure on the 391 cases was incurred for the purpose of minimising or mitigating any loss brought about by perils of the sea.

I think the judgment of the Court below should be affirmed.

RIGBY, L.J. I quite agree, and for the same reasons. I will only add that this appears to me to be an attempt to strain the rule which was explained by the witnesses, so as to free the claimants from expenses which, on their own case, they would have been obliged to incur even if there had been no insurance. It cannot be said that a suspicion of damage entitled them to incur costs, at the expense of the underwriters, if no damage had actually taken place; and if that may be said with truth as to the whole cargo, I think it follows that they could not in this case be entitled to make good this claim against the underwriters in respect of the goods to which there had been no damage.

Appeal dismissed.

Solicitors for plaintiffs: *Whites & Co., for Press & Inskip, Bristol.*

Solicitors for defendant: *Lowless & Co.*

A. M.

EAST LONDON WATERWORKS COMPANY *v.* KYFFIN. 1894 *Oct.* 25.

Waterworks—Rate—Summons before Justices for Non-payment—Demand—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 70, 74—*East London Waterworks Act*, 1853 (16 & 17 *Vict. c. clxvi.*)—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 140.

Where a summons has been taken out for arrears of water rate under s. 85 of the Waterworks Clauses Act and s. 140 of the Railways Clauses Act, it is not a condition precedent to the jurisdiction of the justices to make an order for payment, that a demand should have been made for the amount before the issue of the summons.

Case stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

The respondent, Mr. J. B. Kyffin, was summoned by the appellants, the East London Waterworks Company, to answer their claim for 16*s.*, alleged to be due for water rates chargeable in respect of a house No. 96, Balcorne Street, Hackney.

The annual value of the house did not exceed 20*l.*, and it was supplied with water by the appellants from December 25, 1893, to May 9, 1894.

The respondent between those dates received the rent of the house as being the owner thereof, and was liable to the payment of the water rates which might be chargeable in respect of it.

Half of the sum of 16*s.* claimed by the appellants was claimed in respect of water rates for two quarters to Christmas, 1893, and the other half of the said sum was claimed in respect of two quarters from Christmas, 1893, due on Christmas Day, 1893, and Lady Day, 1894, respectively.

It was admitted that no demand had been made for the water rates in respect of these two latter quarters as and when they became due, nor at any time before the issue of the summons. The respondent objected that in default of demand the rates for those two quarters could not be recovered under the summons. The appellants contended that no such prior demand was required by statute or otherwise. The magistrate was of opinion that until such demand for payment should have been made by the appellants, the respondent's omission to pay the rate was not a

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neglect or refusal within the meaning of the Waterworks Clauses Acts, and that, in the absence of any such demand up to the date of the summons, no matter of complaint had arisen upon which a court of summary jurisdiction had authority to make an order for the payment of money, and he accordingly dismissed the appellants' claim for such sum of 8*s.* on this ground. The other part of the appellants' claim was dismissed on other grounds.

Finlay, Q.C., and *J. F. P. Rawlinson*, for the appellants. The magistrate was wrong. By s. 81 of the East London Waterworks Act, 1853, with which the Waterworks Clauses Act, 1847, is incorporated, "the owners of all houses or parts of houses occupied as separate tenements, and not respectively exceeding the annual value of 20*l.*, shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof." By s. 70 of the Waterworks Clauses Act, 1847, "the rates shall be paid in advance by equal quarterly payments"; and by s. 74, "if any person supplied with water by the undertakers or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers . . . . may recover the rate due from such person if less than 20*l.* . . . . in the same manner as any damages for the recovery of which no special provision is made are recoverable." Sect. 85 enacts with respect to the recovery of damages not specially provided for, that the clauses of the Railways Clauses Act, 1845, with respect to such damages shall be incorporated; and by s. 140 of that Act, "With respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, be it enacted as follows: In all cases where any damages, costs, or expenses are by this or the special Act or any Act incorporated therewith directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by two justices, and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount

may be recovered by distress of the goods of the company or other party liable as aforesaid, and the justices by whom the same shall have been ordered to be paid, or either of them, or any other justice, on application shall issue their or his warrant accordingly." These sections were considered in *East London Waterworks Co.* v. *Charles* (1), which decided that a summons for arrears of water rate amounted to a complaint under 11 & 12 Vict. c. 43; and the Court held that the section, although not very apt, gave power to a court of summary jurisdiction to order the payment of the rates due. Sect. 140, therefore, does not assist the respondent. A demand for the rates is not a condition precedent to their recovery. They are payable quarterly in advance and become legally due on each quarter-day.

A. J. Walter, for the respondent. The magistrate was right. A demand is necessary in order that the owner may know what he has to pay. By s. 74 of the East London Waterworks Act, 1853, the amount of the rate is fixed "at a rate per centum per annum on the annual value of the house not exceeding 5*l*." There are therefore two variable quantities in the amount of the rate, and it is impossible for an owner to know until the demand is made what he has to pay. There can be no "neglect" to pay until there has been a demand for payment and until the owner has thus learned for what amount he is liable.

MATHEW, J. I cannot agree with the decision of the learned magistrate in this case, that it is essential as a condition precedent to his jurisdiction that there should have been a formal demand for this water rate. It is suggested that he arrived at this conclusion because of the use of the word "neglect" in s. 74 of the Waterworks Clauses Act, 1847. It seems to me consistent with what is stated in the case that there may have been a dispute between the waterworks company and the respondent of long duration, and that he may have known perfectly well what amount was demanded of him, and may have refused to pay it on grounds which would be evidence of his neglect. I do not think that it is at all necessary in order to establish his neglect that there should have been a formal demand upon him. It has been

(1) [1894] 2 Q. B. 730.

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Mathew, J.

contended that s. 140 of the Railways Clauses Act, which is incorporated with the East London Waterworks Act of 1853 and the Waterworks Clauses Act, 1847, has no bearing upon this case, and that our decision must depend on the private Act and the Waterworks Clauses Act, 1847. By s. 70 of the Waterworks Clauses Act the rates "shall be paid in advance by equal quarterly payments . . . and the first payment shall be made at the time when the pipe by which the water is supplied is made to communicate with the pipes of the undertakers, or at the time when the agreement to take water from the undertakers is made."

Now, as a matter of business and common sense it is certain that in every case at the time when the communication was made there would be a clear understanding as to what the amount of the rates would be. However that may be, the language of the section is precise, that the rates are payable quarterly in advance. Then, by s. 74, if any person neglect to pay those rates the steps may be taken which are described in the section.

Our attention has been called to s. 74 of the East London Waterworks Act, 1853. It is pointed out that by that section the rate is to be a rate per cent. per annum on the annual value of the house not exceeding 5*l.*, and it is contended that we ought not to assume that respondent knew the amount of the rate to be paid in respect of his house. It is said that he had no means of knowing this amount, and that he was therefore justified in not paying until he did know it. I cannot think why a formal demand should be necessary in order to tell the owner the exact amount that is due. As I have already said, that is a thing which he would be likely to know, and it is not stated in the case that he did not know it; but at any rate on an examination of these sections I can find nothing to support the view of the learned magistrate that a formal demand is a condition precedent to the recovery of the rates. This case must, therefore, be remitted to him.

CHARLES, J. I am of the same opinion. Having regard to ss. 70 and 74 of the Waterworks Clauses Act of 1847, I think

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Charles, J.

it would be impossible to hold that a demand was a condition precedent to the right of the waterworks company to apply to a magistrate under s. 140 of the Railways Clauses Act, 1845. I confess that for a time I was impressed with the argument that the rate being a rate per cent. on the annual value of the house the respondent would not know the amount that was due from him until a demand had been made upon him. But on referring to the special case, I can find nothing that warrants us in assuming that the respondent was ignorant of the amount that he had to pay. I think, therefore, for the reasons given by my brother Mathew, and on a consideration of the sections, that the learned magistrate was wrong in holding that a demand was a condition precedent to the right to proceed by summons.

Case remitted to magistrate.

Solicitors for appellants: *George Kebbell & Miller.*
Solicitor for respondent: *Charles V. Young.*

A. P. P. K.

1894
Oct. 26.

LAVER *v.* BOTHAM & SONS.
THE GUARDIANS OF THE POOR OF THE CHESTERFIELD UNION, CLAIMANTS.

Poor Law—Relief—Property of Deceased Pauper—Reimbursement of Guardians—Debt due to Executor—Right of Retainer—Poor Law Amendment Act, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.

The 16th section of the Poor Law Amendment Act, 1849, which gives the guardians power, in the event of the death of a pauper having property belonging to him, to reimburse themselves the expenses of the maintenance of such pauper during the twelve months previous to the decease, constitutes the guardians ordinary, and not preferential, creditors for the amount so expended by them, and the executor of such a pauper is therefore entitled to retain a debt due from the pauper's estate to himself before satisfying the claim of the guardians.

APPEAL from the county court of Yorkshire holden at Sheffield in an interpleader proceeding.

During the twelve months previous to her death Sarah Goodall received relief from the guardians of the Chesterfield Union to the amount of 16*l.* 18*s.*

After her death the plaintiff, the executor under her will,

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instructed the defendants, a firm of auctioneers, to sell her household furniture and effects, which realized 20*l.* 6*s.* 2*d.*

The defendants, having received notice from the guardians that they claimed 16*l.* 18*s.* of this amount in respect of the maintenance of the pauper during the twelve months previous to her death under the 16th section of the Poor Law Amendment Act, 1849, declined to pay over the proceeds of the sale to the plaintiff.

The plaintiff thereupon brought the action to recover the amount, and, the defendants having interpleaded, an issue was ordered to be tried as to whether the plaintiff or the guardians were entitled to the 16*l.* 18*s.* claimed by the guardians, and the interpleader proceedings were transferred to the Sheffield County Court under the 17th section of the Supreme Court of Judicature Act, 1884.

The plaintiff had supplied the pauper with money and other necessaries during the illness which preceded her death to an amount in excess of the proceeds of the sale of her effects, and had also paid her funeral expenses.

The county court judge held that the language of the first part of the 16th section of the Poor Law Amendment Act, 1849 (1), constituted the guardians not only preferential but secured creditors, and that, although the same words were not repeated in the latter part of the section, the words "in manner aforesaid" ought necessarily to be read in by implication, as

(1) The Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), provides as follows. Sect. 16: "That where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money, or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be); and in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die, may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper, at any time during the twelve months previous to the decease."

otherwise the position of the guardians would be worse in the case where the pauper was dead than where the pauper was still living, and gave judgment in favour of the guardians.

The plaintiff, by leave of the judge, appealed.

Brooke Little, for the appellant. The power to take and appropriate the property of a pauper during his lifetime given by the first part of the section is not given by the latter part of the section in the case of a deceased pauper, nor is there any reason for reading such a power into that part of the section by implication. The section must be construed according to the plain meaning of the words used, and so construed constitutes the guardians ordinary and not preferential creditors of the estate of the deceased pauper. That being so, there is nothing in the section to take away from the executor his right to retain his own debt.

Alexander Glen, for the guardians. The latter part of the section constitutes the guardians preferential creditors of the estate of a deceased pauper. Otherwise the section is meaningless, since the cost of the maintenance of a pauper would be an ordinary debt due to the guardians apart from the statute: *In re Newbegin's Estate.* (1) The object of the legislature was to give the guardians, in addition to their right to recover as an ordinary debt the amount given to the pauper by way of relief for six years, the right to reimburse themselves for one year's relief by taking possession of the pauper's property. It is to be observed that the power given is to "reimburse themselves," and not merely to obtain reimbursement.

The debt of the guardians was incurred under statutory compulsion, and might reasonably be preferred to debts which were voluntarily incurred. The policy of the legislature has always been to prevent persons from looking to the parish for support, and the Courts have always given a liberal construction to statutes passed with this object: *Guardians of West Ham* v. *Ovens.* (2) The 17th section of the Act enables the guardians to incur a voluntary debt by burying poor persons dying out of the union, and in that section the words used to constitute the guardians

(1) 36 Ch. D. 477. (2) Law Rep. 8 Ex. 37.

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ordinary creditors for the amount so expended are plain, and in striking contrast with those of the 16th section, which were clearly intended to confer unusual powers upon the guardians.

MATHEW, J. I think that this appeal must be allowed. A pauper who had been in receipt of relief for a year or more before her death left a small amount of property and appointed as her executor the appellant, who was a creditor for a larger amount than the value of the property she left. The guardians gave notice of a claim under the 16th section of the Poor Law Amendment Act, 1849, and the matter came before the county court judge to decide whether the proceeds of the sale of the property to the extent of the guardians' claim belonged to the appellant or to the guardians.

The case for the guardians was that under the section they had a preferential claim to the proceeds of the sale, and that the executor and the other creditors of the pauper had no right to come in until the claim of the guardians was satisfied. If that were so, it would to my mind be an extraordinary result for the legislature to have arrived at; but, turning to the statute, I do not find any authority given to the guardians to seize the property of the pauper, or anything to shew that the guardians have greater rights than the ordinary creditors of the pauper. The section provides that "where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof, as the case may be." That is the earlier part of the section, and I see nothing to indicate any intention on the part of the legislature to treat the guardians as other than ordinary creditors with the alternative remedy of "taking and appropriating so much of such money or the produce of such security"

as will reimburse them. Then comes the next part of the section, which provides that "in the event of the death of any pauper having in his possession or belonging to him any money or property the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease." The county court judge thought that he ought to read in the words "in manner aforesaid" after the words "reimburse themselves"; but even if it were permissible to read those words into the section, that would not help the guardians, for I have already said that the language even of the first part of the section does not constitute them preferential creditors; added to which, as the words are not in the section, I do not see any reason for reading them into it. The guardians are in my opinion mere creditors applying to be reimbursed the amount they expended upon the relief of the pauper during the twelve months previous to her decease; but there is nothing in the section to take away the right of the executor to retain the debt due to himself before satisfying the claim of the guardians, or the right of any other creditors of the pauper to come in upon an equal footing with the guardians. Upon any other construction of the section the creditors of a pauper would have to bear the costs of the maintenance of such pauper for the last year of his life.

CHARLES, J. I do not think that the section bears the construction which the guardians are endeavouring to put upon it. It seems to me that the learned county court judge overlooked the fact that the power given to the guardians by the first part of the section to take and appropriate the money or securities of the pauper is an alternative remedy. The guardians are not placed by that part of the section in a better position than ordinary creditors, because it says that they may either take the money, or recover the amount as an ordinary debt. But even if I am wrong in that view, and if the power of seizure in the first part of the section indicates an intention to constitute the guardians preferential creditors, still in the

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second part of the section there are no words to be found embodying the first of the alternative remedies given by the first part. The learned county court judge has read the section as if the first part gave only the power to seize, and then, omitting the alternative remedy of recovering the amount as a debt, reads into the second part of the section the words "in manner aforesaid" as if they referred to the power to seize. I do not think that this is the proper mode of construing the section, and I see nothing in it to take away the executor's ordinary right to retain his own debt before satisfying the claim of the guardians.

Appeal allowed.

Solicitors for appellant: *Steadman, Van Praagh, Sims & Co., for Muir Wilson, Sheffield.*

Solicitors for respondents: *Stevens & Parkes, for Jones & Middleton, Chesterfield.*

J. F. C.

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Oct. 26.

SAUNDERS *v.* THE HOLBORN DISTRICT BOARD OF WORKS.

Metropolis—Sanitary Authority—Duties and Liabilities—Removal of Street Refuse—Liability to Action for non-removal of Snow—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 29.

Sect. 29 of the Public Health (London) Act, 1891, which imposes on the sanitary authorities of London the duty of removing street refuse from the streets within their respective districts, does not give any right of action to a person suffering special damage from a breach of such duty.

APPEAL from a decision of the judge of the Clerkenwell County Court non-suiting the plaintiff.

The action was brought to recover damages for injuries sustained by the plaintiff by reason of a fall, caused, as it was alleged, by the neglect of the defendants to remove snow from one of the streets in their district in breach of the statutory duty imposed upon them by the 29th section of the Public Health (London) Act, 1891. (1)

(1) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), provides as follows. Sect. 29: "(1.) It shall be the duty of every sanitary authority to keep the streets of their district, which are repairable by the inhabitants at large, including the footways, properly swept and cleansed so far as is reasonably practicable, and to collect and remove from the said

The county court judge non-suited the plaintiff.

The plaintiff appealed.

W. G. Hawtin, for the appellant. The general principle governing the case is that a breach of statutory duty makes the person chargeable with that duty both punishable by way of indictment and also liable to an action at the suit of any person who may sustain special damage by reason of such breach: Hawkins' Pleas of the Crown, bk. 2, c. 25, s. 4; *Reg.* v. *Hall.* (1) In *Couch* v. *Steel* (2) it was held that a sailor sustaining a private injury from the breach of the statutory duty imposed by 7 & 8 Vict. c. 112, s. 18, which made it the duty of a shipowner to have a proper supply of medicines on board his vessel, was entitled to maintain an action to recover damages, notwithstanding that the Act imposed a penalty for the breach of duty. In *Hartnall* v. *Ryde Commissioners* (3), again, the commissioners were held to be liable to an action for injury to a person caused by a footway within the limits of the local Act being out of repair, notwithstanding that the Act provided that they should be liable to indictment for the neglect to repair. In *Guardians of the Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (4) it was held that an action was maintainable by the guardians to recover from the vestry the expense incurred by them in removing dirt and ashes from their workhouse, which the vestry had refused to remove as required by s. 42 of the Metropolis Management Act, 1855. The respondents

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streets, so far as is reasonably practicable, all street refuse.

"(2.) If any such street in the district of any sanitary authority, including the footway, is not properly swept and cleansed, or the street refuse is not collected and removed from any such street, so far as is reasonably practicable, as is required by this section, the sanitary authority shall be liable to a fine not exceeding twenty pounds.

"(3.) So much of any Act as requires the occupier or owner of any premises in London to cause the footways and watercourses adjoining the premises to be swept and cleansed is hereby repealed."

Sect. 141: "In this Act, unless the context otherwise requires, the expression "street refuse" means dust, dirt, rubbish, mud, road scrapings, ice, snow and filth."

(1) [1891] 1 Q. B. 747, at p. 753.

(2) 3 E. & B. 402.

(3) 4 B. & S. 361.

(4) 2 Q. B. D. 145.

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are in the same position under the Public Health (London) Act, 1891, as the vestry in that case were under the Act of 1855, except that additional duties have now been imposed upon them.

[CHARLES, J. Could the action have been maintained against the occupier of the adjoining premises before the Act?]

There is no authority upon the point. The Act now imposes the duty on the sanitary authority. In *Borough of Bathurst* v. *Macpherson* (1) it was held that the appellants, by reason of their construction of a drain and neglect to repair it, had caused a nuisance in a highway for which, whatever their statutory obligation to repair might be, they were liable to an indictment, and also to an action by the plaintiff who had sustained damage from their breach of duty: see also *Wilson* v. *Merry*. (2) Upon the authority of these cases the plaintiff is entitled to maintain the action.

Courthope-Munroe, for the respondents. The action is not maintainable. The principle governing the case is laid down by the Privy Council in *Municipality of Pictou* v. *Geldert* (3) following the decision of the House of Lords in *Cowley* v. *Newmarket Local Board*. (4) It was held in those cases that the transfer to a public corporation of an obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance, and that in order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed. In this case the statute discloses no such intention on the part of the legislature, and therefore no action lies. *Couch* v. *Steel* (5) and *Hartnall* v. *Ryde Commissioners* (6) are practically overruled by the cases cited. *Borough of Bathurst* v. *Macpherson* (1) is distinguished on the ground that the conduct there complained of was not non-feasance, but misfeasance. *Guardians of the Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (7), is also distinguishable upon the ground that the statute in that case

(1) 4 App. Cas. 256.
(2) Law Rep. 1 H. L., Sc. 326, at p. 340.
(3) [1893] A. C. 524.
(4) [1892] A. C. 345.
(5) 3 E. & B. 402.
(6) 4 B. & S. 361.
(7) 2 Q. B. D. 145.

provided no penalty for a breach of the duty imposed. After the transfer of the duties and liabilities of surveyors of highways to sanitary authorities it was held, in *Gibson* v. *Mayor of Preston* (1), that the authority were not liable under the Public Health Act, 1848, to a person suffering through the non-repair of a highway. In *Atkinson* v. *Newcastle Waterworks Co.* (2) it was doubted whether the proposition could be supported, that whenever a statutory duty is created any person who can shew that he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed, and Lord Cairns expressed an opinion that much must depend on the purview of the legislature in the particular statute and the language which they have there employed. That this was a correct view of the law has now been affirmed in *Cowley* v. *Newmarket Local Board* (3) and *Municipality of Pictou* v. *Geldert* (4), and as there is nothing to indicate that the legislature contemplated an action of this kind in passing the 29th section of the Public Health (London) Act, 1891, such an action cannot be maintained.

W. G. Hawtin, in reply.

MATHEW, J. I think that this appeal must be dismissed. I entirely agree with the conclusion at which the learned county court judge arrived. The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff through the failure of the defendants to discharge their duty of removing the snow from the streets. This duty, which formerly rested upon householders, was imposed upon the sanitary authorities by the 29th section of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). The terms of the first clause of the section are, "It shall be the duty of every sanitary authority to keep the streets of their district, which are repairable by the inhabitants at large, including the footways, properly swept and cleansed so far as is reasonably practicable, and to collect and remove from the said streets, so far as is reasonably practicable, all street refuse." The next clause provides that

(1) Law Rep. 5 Q. B. 218.
(2) 2 Ex. D. 441.
(3) [1892] A. C. 345.
(4) [1893] A. C. 524.

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"if any such street in the district of any sanitary authority, including the footway, is not properly swept and cleansed, or the street refuse is not collected and removed from any such street, so far as is reasonably practicable, as required by this section, the sanitary authority shall be liable to a fine not exceeding twenty pounds"; and the final clause is: "So much of any Act as requires the occupier or owner of any premises in London to cause the footways and watercourses adjoining the premises to be swept and cleansed is hereby repealed." Then by the 141st section of the Act the expression "street refuse" is declared to mean "dust, dirt, rubbish, mud, road scrapings, ice, snow, and filth." These are the obligations created by the statute and imposed upon the sanitary authority, and it is said that upon the authority of *Couch* v. *Steel* (1) and *Hartnall* v. *Ryde Commissioners* (2) the plaintiff is entitled to maintain this action. But there are many subsequent decisions, particularly *Atkinson* v. *Newcastle Waterworks Co.* (3), *Cowley* v. *Newmarket Local Board* (4), and *Municipality of Pictou* v. *Geldert* (5), which conflict with *Couch* v. *Steel* (1) and *Hartnall* v. *Ryde Commissioners.* (2) The result of these decisions is plain. It is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute, it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed no action will lie. In this case there is no indication of any intention on the part of the legislature that such a liability should be imposed. The penalty not exceeding twenty pounds is the sole liability mentioned by the statute. Why should we infer that the legislature had any intention of imposing a liability to action? Before the Act the public had no right of action in such a case. Why should it be supposed that the statute creates a new obligation? In my opinion the meaning of the section must be confined to the plain meaning of the words employed. It imposes a liability to a penalty, and

(1) 3 E. & B. 402.
(2) 4 B. & S. 361.
(3) 2 Ex. D. 441.
(4) [1892] A. C. 345.
(5) [1893] A. C. 524.

no further liability. If we adopted any other construction we should in my judgment be imposing a liability which has not been imposed by the legislature. I think that this appeal must be dismissed.

CHARLES, J. I am of the same opinion. I entirely agree with the decision of the learned county court judge. The duty imposed upon the sanitary authority is created by the 29th section of the Public Health (London) Act, 1891. Until that section was passed it was not the duty of the sanitary authority to take any steps to clear the streets of ice and snow. In order to shew that the sanitary authority are liable to an action for their failure to perform this duty, it is necessary to shew in the statute an intention on the part of the legislature to impose this liability upon the sanitary authority. That is the principle of *Cowley* v. *Newmarket Local Board* (1) and of *Municipality of Pictou* v. *Geldert*. (2) Lord Hobhouse, in delivering the judgment of the Privy Council in the latter case, says (at p. 527): "The latest English case is that of *Cowley* v. *Newmarket Local Board*. (1) It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed." Upon looking at this section I fail to see any intention on the part of the legislature to impose a liability to an action for non-feasance. In the second part of the section a penalty is imposed, and, inasmuch as the penalty is imposed in the same section as the duty, it seems to me clear, upon the principle of *Reg.* v. *Hall* (3), that the sanitary authority could not be indicted. It is not, indeed, contended that they could be. Has, then, anything been done by the legislature to make them liable to an action? We were referred to the cases of *Couch* v. *Steel* (4) and *Hartnall* v. *Ryde Commissioners*. (5) Now, although it is true that those cases have not

(1) [1892] A. C. 345.
(2) [1893] A. C. 524.
(3) [1891] 1 Q. B. 747.
(4) 3 E. & B. 402.
(5) 4 B. & S. 361.

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been formally overruled, they have been spoken of both by the House of Lords and the Court of Appeal in terms which make them no longer binding authorities. In *Atkinson* v. *Newcastle Waterworks Company* (1) Lord Cairns, in the Court of Appeal, indicated clearly that he did not approve of the general proposition laid down in *Couch* v. *Steel* (2), and took the view that in each case the purview of the particular statute was to be looked at to see whether a liability to action is imposed as well as a penalty. This case was followed by *Cowley* v. *Newmarket Local Board* (3) in the House of Lords, and *Municipality of Pictou* v. *Geldert* (4) in the Privy Council.

In the present case the state of things previous to the Public Health (London) Act, 1891, was that no duty lay on the inhabitants of a parish to remove snow from the streets. They could not be indicted for not doing so, and they were under no liability to action. A surveyor of highways was beyond doubt not liable to action. When the duties of that office were transferred to sanitary authorities, it was held that they were not liable to action. That being the state of things, the legislature, by the 29th section of the Public Health (London) Act, 1891, imposed upon the sanitary authority a duty which had never been imposed upon them before, and by the same section provided a penalty for its non-performance. In my judgment it is impossible to say that the language of the section indicates an intention on the part of the legislature to impose a liability to action in addition to the penalty. I need not refer to the serious results which would attend a contrary construction of the section, because we are bound to look at the statute itself without regard to them; but to my mind it would be a most extraordinary piece of legislation if any one injured by the failure of a local authority to cleanse the streets were able to bring an action against the authority to recover damages for the injury. I think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. W. Essel.*

Solicitor for respondents: *M. H. Hale.*

(1) 2 Ex. D. 441, at p. 448.
(2) 3 E. & B. 402.
(3) [1892] A. C. 345.
(4) [1893] A. C. 524.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
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Nov. 13.

GRAINGER & SON, APPELLANTS; GOUGH (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Trade exercised within United Kingdom—Assessment in Name of Agent—"Factor, Agent, or Receiver having the Receipt of Profits or Gains"—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sched. D—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41–44.

By s. 41 of the Income Tax Act, 1842, "Any person not resident in the United Kingdom . . . shall be chargeable in the name of . . . any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person":—

R., a wine merchant in France, habitually and to a large extent carried on the business of selling champagne to customers resident in England, through the appellants, whom he employed as his agents in this country to procure orders for his wine from such customers and transmit the same to him in France. The wine so sold was forwarded from France to the customer direct at the customer's risk and expense. The invoices for the wine were made out by R. to the customer in the name of R. as vendor, and were forwarded to the appellants, who forwarded the same to the customer. The purchase-money of the wine was for the most part paid by the customers to R., but a certain amount of it was received for him by the appellants, which, however, did not more than cover their commission and disbursements. All receipts for such moneys, whether paid to R. direct or through the appellants, were forwarded by R. to the customer direct:—

Held, that R. exercised a trade in the United Kingdom within the meaning of Schedule D of the Income Tax Act, 1853; and that he was assessable in the name of the appellants as his agents under s. 41 of the Income Tax Act, 1842.

Semble, the words "having the receipt, &c.," refer only to the word "receiver" in the section, not to the preceding words "factor" or "agent."

APPEAL from the judgment of a Divisional Court (Mathew and Cave, JJ.) on a case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for General Purposes of the Income Tax Acts for the City of London.

The case stated as follows.

1. At a meeting of the said commissioners Messrs. Grainger & Son appealed on their own behalf against assessments for each of the years 1884, 1885, and 1886 of 3000*l.* made as follows: "Louis Rœderer of Rheims, champagne shipper, in the name of Grainger & Son, agents, 108, Fenchurch Street," under the circumstances following.

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2. Mr. Louis Rœderer is a wine merchant and champagne shipper whose chief place of business is at Rheims in the Republic of France, and has for many years shipped large quantities of champagne to England in the course of his business.

3. The appellants, Messrs. Grainger & Son, are wine merchants carrying on business at No. 108, Fenchurch Street, in the City of London, and are the London agents of the said Louis Rœderer. They also carry on there an extensive business of their own as wine merchants.

4. The appellants are agents in Great Britain for the sale of L. Rœderer's wine, and they appoint other persons in towns other than London as sub-agents. The business transacted by Messrs. Grainger & Son on behalf of Mr. Rœderer has been carried on in England for many years, and is very extensive. The orders are sought in the name of Louis Rœderer, and when received are transmitted by the appellants to Louis Rœderer at Rheims, and he exercises his discretion as to executing the said orders. In every instance he forwards the wine direct to the customer in England free on board at Rheims and at the latter's risk and expense. The wine is invoiced by Louis Rœderer to the customer in Louis Rœderer's name as vendor. No other wines are sent to this country except those ordered through the appellants as aforesaid. Amounts due in respect of the wine so sold are collected by Messrs. Grainger & Son at 108, Fenchurch Street aforesaid on behalf of Mr. Rœderer, and receipts are given for and on his behalf; but the customers frequently remit the amount of their invoices direct to Louis Rœderer as hereinafter mentioned. The appellants are entitled to a commission upon all orders received from Great Britain if executed, and have no other interest in the sale. Louis Rœderer has registered a series of trade-marks in Great Britain, as appears by a print of the *Trade Marks Journal* annexed and forming part of this case. Louis Rœderer keeps a large stock of wine at Rheims especially for sale in Great Britain and known as "Reserve for Great Britain"; but neither he nor the appellants for his account keep any of this stock in England.

5. In case of default in payment by any customer, proceedings are taken in the English Courts in the name of Mr. Rœderer,

and proof in bankruptcy is made in Mr. Rœderer's name against any bankrupt debtor.

6. The appellants, Messrs. Grainger & Son, receive money, that is to say, cash, from the purchasers of wine here on account of the said Louis Rœderer; but the money so received sometimes but rarely exceeds the commission due to the said appellants, and then only to a comparatively small amount. They on his behalf occasionally incur and pay for him other charges which absorb such excess. The said Louis Rœderer usually draws on his customers in England direct.

7. In addition to the said cash the said appellants, Messrs. Grainger & Son, receive English and foreign drafts and cheques on English banks and on French houses, payable to the said L. Rœderer in respect of orders fulfilled by the said Louis Rœderer, and forward the same to their principal, who sends receipts to his customers therefor.

8. It appeared from the course of business that the said Messrs. Grainger & Son are paid their commission by a per contra account in their ledger in which the amounts received by them on account of the said Louis Rœderer are set off against the amount due to them for commission. The appellants had paid the income tax on the said commission.

9. The appellants, Messrs. Grainger & Son, on their own behalf and not on behalf of the said Louis Rœderer, contended upon the above-mentioned facts—

(1.) That Louis Rœderer was not a person exercising a trade within the United Kingdom, either in the terms of Schedule D of 16 & 17 Vict. c. 34 alone, or read with s. 41 of 5 & 6 Vict. c. 35.

(2.) That the appellants were not agents within the terms of the 41st section of 5 & 6 Vict. c. 35, and they claimed that the assessment should be discharged, or that their names should be erased therefrom.

10. The Commissioners of Taxes were of opinion that the said assessment was rightly made, and confirmed the same accordingly.

It appeared to have been thought by the Court, when the case first came on for argument in the Queen's Bench Division, that a fuller statement of the facts in some respects was necessary,

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and therefore the case was by order of the Court remitted to the commissioners, who in obedience to such order by way of addition to and amendment of the special case stated as follows.

1. Having heard the appellants on the subject of the suggested amendment of the special case, the commissioners find as follows:—

2. That the said Louis Rœderer exercises and carries on the trade or business of a wine merchant in Great Britain, except so far as the facts stated in the case and in this amendment prove a different conclusion in point of law.

3. That offers and proposals for the purchase of wine are not only received by Messrs. Grainger & Son in England, but orders are sought by them as agents on behalf of Louis Rœderer as their principal.

4. That such orders are given by customers to Messrs. Grainger & Son and received by them; but the appellants allege that the said Louis Rœderer in his arrangements with them as his agents has reserved a right to reject any particular order. In the opinion of the commissioners this right is in fact intended to protect the said Louis Rœderer in cases where there is doubt as to the pecuniary position of the customer giving the order. No special notice is given to the customers of the above-mentioned right reserved.

5. In the Post Office London Directory, under the head "Trades," "Wine Merchants," is inserted the following: "Rœderer, Louis, Reims; champagne merchant (Grainger & Son, agents), 21, Mincing Lane, E.C.," which had been inserted by the authority and with the knowledge of the appellants. The appellants admitted that it was well known that Rœderer's English agents were the appellants, at whose office orders would always be received, and that Rœderer does an extensive trade in the United Kingdom, and has done so for many years, and has habitually made contracts in the manner described in the original case.

6. The commissioners find that the wine is sold to the customers as it lies "In Reims cellar," or "Pris en cave." Where wine is so sold the customer pays the cost of packing, carriage from the cellars, and takes all risk. The packing and arranging

for transit is, however, actually performed by persons employed by Louis Rœderer, and the customer is charged by Louis Rœderer with a sum in respect of such work under the designation "Pour emballage, &c."

7. The invoices of the wine are made out and sent by Louis Rœderer to the appellants, who in their turn forward same to the customer.

8. The commissioners find that the direct payments to Louis Rœderer by cheques or drafts to his order are more frequent than payments made through Messrs. Grainger & Son, and that in addition to cash, some cheques on behalf of Louis Rœderer are paid to and cashed by Messrs. Grainger & Son. The receipts for all money paid either to Mr. Louis Rœderer or through Messrs. Grainger & Son are sent by Mr. Louis Rœderer to the customers direct.

9. Except so far as any statement made in the original case herein is modified or added to by the amendments herein, the commissioners confirm the said case, and find further as stated herein. (1)

(1) Under Schedule D to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), duty is chargeable (inter alia) "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . . any profession, trade, employment, or vocation exercised within the United Kingdom."

By s. 41 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), "The trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property . . . . of such infant, married woman, lunatic, idiot, or insane person, whether such infant, married woman, lunatic, idiot, or insane person shall reside in Great Britain (now the United Kingdom) or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself; and any person not resident in Great Britain (now the United Kingdom), whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain (now the United Kingdom), and in the actual receipt thereof; and every such trustee, guardian, tutor, curator, committee, agent, or receiver shall be answerable for the doing of all such acts, matters, and things as

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Pyke, Q.C., and *R. M. Bray*, for the appellants. First, Rœderer did not exercise a trade in this country, and therefore was not liable to income tax. The appellants were not his agents to sell wine, but merely to procure orders and transmit them to him in France, and he exercised his own discretion whether he should accept them. On the facts stated, it must be taken that the contracts for the sale of the wine were made in France. The wine purchased was not sent to the appellants to be by them delivered to the customer, but it is found that it was sold to the customer as it lay in the cellar at Rheims, and was forwarded at the customer's risk and expense. The only moneys received by the appellants for Rœderer appear to have been certain comparatively small sums in cash and otherwise, which did not amount to more than would cover their commission and disbursements. With this exception, the price of the wines was paid by the customers to Rœderer by cheque or draft payable to his order, and receipts were sent by Rœderer to the customers direct. Under these circumstances the wine cannot be considered as sold in this country. The case is therefore distinguishable from *Werle* v. *Colquhoun* (1), where the contracts for sale of wine were made in England. This case is governed by the decision of this Court in *Grant* v. *Anderson*. (2)

[They also cited on this point *London Bank of Mexico and South America* v. *Apthorpe*. (3)]

Secondly, assuming that Rœderer did exercise a trade in this country, the appellants were not agents within s. 41 of the Income Tax Act, 1842, because they were not agents having the receipt of the profits or gains of such trade. They merely received certain small sums which were sufficient to cover their commission and disbursements. The words "having the receipt, &c.," in the section refer to the words "factor" and "agent" as well as "receiver." It would be contrary to natural justice that agents should be rendered liable to be assessed and to pay the

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shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

(1) 20 Q. B. D. 753.
(2) [1892] 1 Q. B. 108.
(3) [1891] 2 Q. B. 378.

tax themselves, as agents within the statute would be, where they have no funds of the principal out of which to pay. At any rate, they can only be liable to the amount of the sums they actually receive, and the assessment is here made in respect of the whole profits of the business.

[LORD ESHER, M.R. The only question open on this case appears to be whether the appellants are liable to assessment as agents representing Rœderer. The question whether the amount of the assessment is right does not appear to be open.]

Sir R. T. Reid, A.G., and *Danckwerts*, for the Crown. [The Court intimated that they need not argue the first question raised by the appellants.] As Rœderer carries on a trade within the United Kingdom, he is chargeable with the tax under Schedule D. He owes the money by virtue of the statute, but he personally cannot be reached. Sects. 41 to 44 of the Act of 1842 are mere machinery for the purpose of enabling the assessment in such cases to be collected vicariously from persons who, the legislature very reasonably thought, will be able to reimburse or protect themselves, or who, if they cannot do so, ought not to put themselves in the position of agents, and so enable the business to be carried on by foreigners in evasion of the revenue laws. The section is machinery for the purpose of getting at the principal, and recovering the debt due from him—i.e., the whole debt, for it is not divisible. For this purpose the principal is to be assessed in the name of the agent. The agent is treated as assessed, and is liable to pay; but this supplementary liability of the agent does not relieve the principal, who is ultimately liable: *Tischler* v. *Apthorpe*. (1)

In this case the appellants receive some profits or gains. If, however, it were necessary to decide the question, the contention for the Crown would be that the true construction of s. 41 is that the words "having the receipt, &c.," only refer to the immediately preceding word "receiver," not to the words "factor" or "agent." They were probably inserted to define the meaning of the word "receiver," which, standing alone, would be somewhat vague. The provisions of the section may seem stringent;

(1) 52 L. T. 814.

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but the object was to prevent the revenue laws from being evaded by persons resident out of the jurisdiction who carry on a trade in this country through agents. The agent can, under s. 44, claim indemnity against the principal, and, in any case, no one is obliged to become such an agent. If he does, he must take the risk. But that question does not arise, for, assuming that the other construction of the section is correct, the appellants are within it, for they received some profits or gains of the trade exercised.

[LORD ESHER, M.R. What is to be understood by "profits or gains" in the section?]

Any moneys received for the sale of the wine. It would be impossible to say whether moneys received are "profits" in any other sense. The fact that the sums received by the appellants did not, as it happened, amount to more than the amount of their commission and disbursements is immaterial. They cannot marshal the receipts in this way for the purpose of making out that the particular sums received were not profits, but commission and disbursements.

R. M. Bray, for the appellants, in reply.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. Mr. Rœderer is, as is well known, one of the greatest champagne merchants in France, and has very extensive dealings in champagne in this country. He appoints the appellants his agents in this country. For what purpose does he appoint them agents, if not for the purpose of carrying on business here? For what business does he so appoint them agents? Clearly, the business of selling his champagne to persons in this country. It is not a question of the sale of champagne to persons in this country on casual occasions; such sale forms a regular part of his ordinary business; and, it appears to me that in reality he appoints the appellants his agents to look after that branch of his business, and to manage the sale of his wines in this country. They appoint other persons as sub-agents in towns other than London. They have to procure and accept orders for his wine in this country, which they transmit to him in France. This country is the substantial basis of the business so carried on.

The customers are people resident in England; the wine is sold in England in the sense that it is sent to and is to be consumed in England. As we have said in previous cases, the question whether a person resident abroad is exercising a trade in this country is a question of fact which depends on the circumstances of each particular case. It is impossible to give beforehand an exhaustive definition of what will or will not amount in particular cases to exercising a trade in this country. We have to determine the question whether Mr. Rœderer, on the particular facts of this case, exercises a trade in this country. I can give no closer definition than that in considering this question one must consider whether he makes this country the substantial basis of what, by reason of its magnitude, has become a business or trade. I am of opinion that he does, and that he therefore exercises a trade in this country within the meaning of the Income Tax Acts. It is admitted that, if that is so, he can be assessed under the Acts relating to income tax; and he will have to settle with the Income Tax Commissioners what the amount of the profits in respect of which he is assessable may be.

The second question raised is as to the position of the appellants. They do not themselves carry on the business of wine merchants in regard to what they do for Mr. Rœderer. They are clearly agents of some kind for him. We have arrived at the conclusion that he does carry on a business in this country. The contention on their behalf is that, though they are his agents for the purpose of helping him to carry on this business, they are not chargeable under the Act of 1842. The question whether this is so depends on the construction of that Act. It is not much use invoking the principles of natural justice in regard to the construction of an enactment of this sort. The object of such an enactment is in some way or other to enable the crown to get the amount of the tax which is assessable upon a person resident out of the United Kingdom, and for which he is intended to be made ultimately liable. The sections 41 to 44 of the Act of 1842 are mere machinery for this purpose. The mode adopted is to get at the person resident abroad through an agent of his in this country. By s. 41 it is provided

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that persons not resident in Great Britain shall be chargeable "in the name of any factor, agent, or receiver having the receipt of any profits or gains" arising as mentioned in the Act, and that every such agent or receiver shall be "answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same." It appears from the words of s. 44 that, though such an agent is not a person himself making profits or gains by the business, he is to be assessed, and, seeing that he can be assessed, one would expect the section to provide, and I think the true construction of s. 41 is that it does provide, that he shall pay the amount of the assessment. For what otherwise would be the good of assessing him? Therefore the person resident abroad who is chargeable is to be chargeable in the name of his agent here, and, when s. 44 is looked at, it appears that the meaning is that he is to be chargeable by means of the assessment of his agent, who is liable to pay the amount so assessed. I do not say that the person resident abroad is not to be considered to be assessed himself, for I think that he is. But the agent is also to be treated as assessed. The question what sort of an agent can be so assessed depends on the construction of s. 41. I think the word "factor" is used in that section in its proper legal sense, viz., as meaning an agent who has possession of the goods of his principal: and in regard to such an agent the words "having the receipt of any profits, &c.," are not wanted, because he has a right to receive such profits by virtue of his employment. If those words are not to be carried back to the word "factor," grammatically they cannot be carried back to the word "agent," and, that being so, they can only apply to the word "receiver." The words are apparently used for the purpose of defining the kind of receiver intended by the word "receiver" in the section, which seems to me to have been inserted for the purpose of clearly bringing within the section in addition to factors and "agents" in the more usual sense of the term this sort of agent, viz., persons who might be appointed by a principal resident abroad to receive profits or gains of business carried on in this country. It is not necessary, in my opinion, in order

to bring an agent within s. 41, that he should be anything more than an agent appointed by a person resident abroad for the purposes of a business carried on in this country. Therefore the appellants come within the description of agents contemplated by the section, and are liable to be assessed. For these reasons I think the appeal must be dismissed.

LOPES, L.J. I have only a very few words to add to what the Master of the Rolls has said. The first question is whether or not Mr. Rœderer exercises a trade within the United Kingdom. It appears from the statement of facts in the case that he appoints the appellants his agents in this country for the sale of his wine. If they are not appointed agents for the purpose of carrying on a trade, for what purpose are they appointed? They appoint a number of sub-agents in towns other than London. It is their duty to canvass and seek for orders in this country. The orders when obtained are sent to the appellants in this country, and by them transmitted to Rheims; and in pursuance of those orders goods to a large extent are supplied in this country. It seems to me impossible to say that this does not amount to exercising a trade in this country. I know of no better definition of what constitutes the exercise of a trade than what was said by the Master of the Rolls, then a Lord Justice, in *Erichsen* v. *Last* (1). He there said: "The only thing that we have to decide is whether upon the facts of this case this company carry on a profit-earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." Every word of that description appears to me to be answered in this case. A profitable trade is really carried on in this country; contracts are habitually made by Mr. Rœderer with customers in England, and goods are supplied under such contracts to such customers. I think that beyond all question Mr. Rœderer does exercise a trade in the United

(1) 8 Q. B. D. 414.

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Kingdom, and the appellants are his agents for the purposes of such trade.

The second question is this. It is said that the appellants are not agents within s. 41 of the Income Tax Act, 1842. In my opinion, they are. The view I take of the group of sections 41 to 44 of the Act is that the paramount object the legislature had in view was to enable the revenue authorities to recover the amount of the tax. There were no means of reaching a foreigner resident abroad, although he exercised a trade in this country. The object was to provide such means. The mode of effecting this object adopted by the Act is to render an agent liable to be assessed and to pay the tax. It is said that, having regard to the words "having the receipt, &c.," in the second clause of s. 41, the appellants are not agents within the section because they were not in receipt of profits or gains. I do not read those words as applying to the words "factor" or "agent" at all. I think they are only to be read with the word "receiver," which immediately precedes them, and that those words were introduced for the purpose of bringing within the section a class of persons who it was thought possibly might not otherwise have been within it. It is said that the effect of this construction of the section will be to inflict a great hardship because the agents may have to pay the tax out of their own money. I do not see much danger of that result. As a rule agents are well able to take care of themselves. By the provisions of s. 44 they are entitled, if they have in their hands moneys belonging to the principal, to set that off against payments which they make in pursuance of the Act: and, if an agent thought there was a chance of his not being reimbursed any moneys he paid in respect of income tax, it would be open to him to take an indemnity from the principal. In any case, we have nothing to do with considerations of hardship, and have only to administer the law as we find it.

Assuming, however, that the contention for the appellants is correct, and the words "having the receipt, &c.," apply to all the words that precede them, in the present case it appears to me that profits were received by the appellants. It may be that commission was due to the appellants which would cover the

sums actually received by them; but that does not in my opinion shew that profits were not received by them within the meaning of the section.

A. L. SMITH, L.J. In this case an assessment was made upon Mr. Rœderer in the name of the appellants. The first question is whether Mr. Rœderer exercised a trade within the United Kingdom, for Schedule D imposes the tax in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any profession, trade, employment, or vocation exercised within the United Kingdom. I quite agree with what has been said in the cases which have been cited, to the effect that the question whether a person exercises a trade in the United Kingdom is a question of fact which depends upon the circumstances of the particular case. The argument of the appellants' counsel really was that, because in this case all the facts do not exist that existed in other cases such as *Werle* v. *Colquhoun* (1) and *London Bank of Mexico and South America* v. *Apthorpe* (2), therefore in this case Mr. Rœderer did not carry on a trade within the United Kingdom. I cannot adopt that argument. The question is whether on the facts of this case he so carries on business. It seems to me impossible, having regard to some of the statements in the case, to say that he does not. It is found that he has for many years shipped large quantities of champagne to England in the course of his business; that the appellants are agents in Great Britain for the sale of his wine, and that they appoint other persons in towns other than London as sub-agents; and that the business transacted by the appellants on behalf of Mr. Rœderer has been carried on in England for many years and is very extensive. So that it is not a question of an isolated transaction or transactions, but of a business in this country that has been carried on for years in an extensive way. Again, it is stated that in the Post Office London Directory under the heads "Trades," "Wine Merchants," the name of Mr. Rœderer is inserted. I think it clear that, apart from anything that has been said in other cases, Mr. Rœderer does

(1) 20 Q. B. D. 753. (2) [1891] 2 Q. B. 378.

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exercise a trade in the United Kingdom within the meaning of the Income Tax Acts.

The case of *Grant* v. *Anderson* (1), in which the Court held that the defendant did not carry on business within the jurisdiction, was relied upon as shewing the contrary. But that case turned on the interpretation of the rules as to the issue and service of writs, not on the Income Tax Acts, and I adopt with regard to it the observations of Cotton, L.J., in *Erichsen* v. *Last* (2), where he said: "With reference to the argument which was much pressed upon us by Mr. Bremner, that a company does not carry on its business except where its place of management is, I wish to say that, however true that may be as regards the meaning of the words "carry on or exercise business" in some Acts of Parliament, it is not the true interpretation of those words in this Act of Parliament, where the object is not to see where a company is to be sued, but what duty on profits it is to pay in this country."

The second point arises with regard to the construction of s. 41 and the following sections of the Income Tax Act, 1842. In my judgment the scope of the legislation is this. There is in Schedule D, as we have seen, a power of taxing persons like Mr. Rœderer who are resident out of the United Kingdom in respect of the profits of a business carried on within it; but there is no effective remedy against them personally. Under those circumstances the machinery provided is that, if such a person has an agent in this country for the purpose of such business, he may be assessed in the name of such agent, and the agent must pay the amount of such assessment, so that the Crown may not go without the duty. It is argued that, although this may be the machinery for reaching the person ultimately liable, still it is confined to an agent who has the receipt of profits or gains. I was at first much struck with this argument; but on further consideration I am of opinion that the section should not be so read. Reading s. 41 reddendo singula singulis, I agree that the words "having the receipt, &c.," are applicable only to the word "receiver" which immediately precedes them. But, even if this be not so, it does not avail the appellants, because it

(1) [1892] 1 Q. B. 108. (2) 8 Q. B. D. 414.

seems clear from the case that some profits or gains were received by them for Mr. Rœderer in this country, and no point as to amount is raised in the case.

Appeal dismissed.

Solicitors for the appellants: *Irvine, Hodges, & Borrowman.*
Solicitor for the respondent: *Solicitor for Inland Revenue.*

E. L.

Followed. Re HARRY DUNN. [1949] 1 Ch. 640

EX PARTE PAINTER. IN RE PAINTER.

1894 *Oct.* 29, 30.

Bankruptcy—Right to annul Adjudication—Debtor presenting his own Petition —Adjudication not for Benefit of Creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 8, *sub-s.* 1.

A creditor having obtained judgment for 294*l.* against a debtor possessed of an inalienable pension, took out a judgment summons against him for the payment of the debt by instalments. The debtor, with the intention of evading such proceedings, filed his petition in bankruptcy. The creditor was practically the sole creditor, and the assets were under 12*l.* The debtor having been adjudicated bankrupt in due course on this petition:—

Held, that the presentation of the petition by the debtor under such circumstances was not an abuse of the process of the Court, and did not entitle the Court to annul the adjudication.

APPEAL from the decision of the deputy judge of the Warwickshire County Court holden at Birmingham.

The debtor, who had been an inspector in the Birmingham police force, retired from that force in 1891 on a pension of 1*l.* 13*s.* 4*d.* per week, subject to the provisions of the Police Act, 1890, which by s. 7 provides that on the bankruptcy of the pensioner the grant shall not pass to any trustee or other person acting on behalf of the creditors. In August, 1893, one Blizzard recovered judgment against the debtor in an action for slander for 294*l.* 0*s.* 11*d.* The debtor not having paid anything in respect of this debt, Blizzard on November 17, 1893, took out a judgment summons against him in the Birmingham County Court, and an order was made for the payment of 3*l.* in fourteen days, and 2*l.* a month. Default having been made in the payment of these amounts, a further judgment summons was issued, the hearing of which was fixed for January 30, 1894. On January 29, 1894, the debtor filed his petition in bankruptcy,

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and a receiving order was made on such petition on February 7. The petition set out three other debts besides that to Blizzard, being 35*l.* to his solicitors, 5*l.* to his tailor, and 20*l.* to his wife. The assets were stated to be 11*l.* 6*s.* 2*d.* Blizzard then applied to the county court judge to annul the bankruptcy; and on April 16 the deputy judge delivered judgment, annulling the bankruptcy on the ground that the adjudication had been obtained by the debtor for a purpose foreign to the administration of the bankruptcy law, i.e., solely for the purpose of defeating the claims of Blizzard.

The debtor appealed.

J. S. Pritchett, and *Evans Austin*, for the appellant. The Court had no power to annul the adjudication. The only power is given by the Bankruptcy Act, 1883, s. 35, sub-s. 1: "Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt": *In re Hester, Ex parte Hester* (1); *In re Gyll.* (2) There is no ground here for saying that the debtor ought not to have been adjudged bankrupt. The Act of 1869 took away the previously-existing right of a debtor to file his own petition; but it is restored by the Act of 1883, s. 8, sub-s. 1, which provides that the Court "shall" make a receiving order upon it. This is in contrast to the terms of s. 7, sub-s. 2, which provides that in case of a creditor's petition the Court "may" make a receiving order upon it. The right of a debtor to be adjudicated bankrupt on his own petition is therefore absolute. The facts of this case do not justify the annulment of the adjudication. The only object of the respondent is to get his debt paid out of the pension of the appellant, which is expressly protected by statute. The fact that there was practically only one creditor is not a reason for annulling the adjudication: *In re Bullen, Ex parte Arnaud.* (3)

Muir Mackenzie, for the respondent Blizzard. The Court had power to annul the adjudication. Under the circumstances the manifest object of the debtor was to escape from being forced to pay his debt by instalments: *In re Nuthall.* (4) Where the

(1) 22 Q. B. D. 632.
(2) 5 Morrell Bank. Cas. 272.
(3) 5 Morrell Bank. Cas. 243.
(4) 8 Morrell Bank. Cas. 106.

petition is an abuse of the process of the Court, the Court has power to refuse to make the receiving order, and therefore to annul the adjudication: *In re Bond.* (1) A general power to a debtor to present his own petition was given in similar terms by s. 86 of the Act of 1861, and it was held that there was power in such cases to annul the bankruptcy where the debtor had presented his petition solely in order to avoid the effect of the Debtors Acts: *In re Charles Peacock* (2); *Ex parte Hewitt, In re Drinkwater* (3); *Ex parte Ensby, In re Ensby.* (4)

The right of a debtor to present his own petition was, however, taken away by the Act of 1869, which enabled a debtor to proceed by liquidation. The Court would not permit this where the debtor's object was merely to get rid of a creditor's claim: *Ex parte Russell* (5); *Ex parte Staff.* (6) [The following cases were also referred to: *In re West* (7); *Ex parte Philpott* (8); *Ex parte Norton* (9); *Ex parte Gaitskell.* (10)]

Pritchett, in reply. All the cases which have been cited on the Act of 1861 were applications for discharge, and not for annulment of bankruptcy. In *Ex parte Russell* (5) and *Ex parte Staff* (6) the Court refused to allow the debtor to evade bankruptcy by taking proceedings for liquidation. Those decisions have no bearing, therefore, on this case. By the Act of 1883 stringent powers are given to the Court for the first time as to the conditions of granting an order of discharge to bankrupts, and the position of a bankrupt is therefore much more onerous than it used to be.

VAUGHAN WILLIAMS, J. This is a case of great importance, and I think that we ought to come to a different conclusion from that of the county court judge. The application before him was an application by a creditor to annul the adjudication in bankruptcy of the debtor. Under the Bankruptcy Act of 1883 an adjudication can only be annulled on the grounds mentioned in s. 35 of that Act, that is to say, "Where in the

(1) 21 Q. B. D. 17.
(2) 14 W. R. 49.
(3) 31 L. J. (Bank.) 83.
(4) 35 L. J. (Bank.) 23.
(5) Law Rep. 10 Ch. 255.
(6) Law Rep. 20 Eq. 775.
(7) 7 L. T. (N.S.) 569.
(8) De G. 346.
(9) De G. 504.
(10) 3 Deac. 635.

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opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full." The only ground possibly applicable in this case would be the first—"that the debtor ought not to have been adjudged bankrupt."

By s. 8, sub-s. 1, of the Act of 1883 a debtor is entitled to present his own petition, and "the Court shall thereupon make a receiving order." The course of legislation on this subject has from time to time varied a good deal. Under the earlier bankruptcy Acts no petition could be presented by the debtor himself. If the debtor desired to be relieved from the pressure of his debts, he must take proceedings under another series of Acts—those for the relief of insolvent debtors. But from an early period the legislature recognised the interest that the State had in a debtor being relieved from the overwhelming pressure of his debts, and that it was undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship. Gradually the law was modified, and by the Act of 1849 a debtor was enabled to present his own petition on certain conditions, the main feature of which was that his estate should be able to pay a certain proportion in the pound. Then came the Act of 1861, which for the first time applied the bankruptcy law to insolvent debtors, and which by s. 86 gave a perfectly general power to any debtor to petition for adjudication of bankruptcy against himself. Next came the Act of 1869, in which the legislature did not continue this provision, probably because provision was made for liquidation by arrangement, which it was thought would enable the debtor to arrange his affairs without having recourse to a petition for his own adjudication. In 1883 the legislature reverted to the terms of the Act of 1861. Are there any limitations to the words used? It does not seem to me that there are: "A debtor's petition shall allege that a debtor is unable to pay his debts . . . and the Court shall thereupon make a receiving order."

It is contended that the Court must have an inherent power to prevent abuse of its process, and that if such abuse of process is clear no order will be made. The learned counsel for the

appellant would not go so far as to say that the word "shall" in the section took away this inherent power of the Court to protect its own jurisdiction, although he very rightly laid stress on the comparison to be drawn between the proceedings on a debtor's petition under s. 8, where the Court "*shall* thereupon make a receiving order," and the proceedings on a creditor's petition under s. 7, where the Court *may* make such order. I assume, therefore, that the Court has such inherent power as is contended for, and that the county court judge acted in pursuance of such power. As I understand his judgment, he annulled the adjudication because the presentation of the petition by the debtor was in his opinion an abuse of the process of the Court. Now, why did he think it an abuse of the process of the Court? Because the debtor, who was a retired police inspector in the receipt of an inalienable pension, having been an unsuccessful litigant, and having incurred a debt for damages and costs for which judgment had been given against him, and which he had been ordered to pay by instalments with the ultimate prospect of a committal order if he made default in such payment, was minded to get rid of this obligation, to pay which might compel him to use a portion of his pension for the payment of his debt, and so got himself adjudicated bankrupt in order that the adjudication might relieve him from the debt and the consequent pressure put upon him. It is said that for a debtor to present a petition against himself under such circumstances is an abuse of the process of the Court; and we have now to decide whether it is so or not. I have no doubt whatever that the motive of the debtor in this case was to get rid of the pressure to pay this debt out of his pension; but my doubt has been whether we are entitled to say that the presentation of the petition by the debtor for such a purpose and with such motives is such an abuse of the process of the Court as to compel us to annul the adjudication. My wish certainly would be to arrive at the same conclusion as that of the county court judge. I have tried to find reasons which would justify me in that conclusion. If one had to legislate oneself in this matter one would be glad to insert provisions which would render the presentation of his own petition by a debtor under such circumstances

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an impossibility. It is, however, important to remember that some such provisions were introduced in the Act of 1849. The object of the limitation in that Act on the power of debtors to present their own petitions was to prevent debtors, who had no assets which could be distributed among their creditors, from becoming bankrupts on their own petition, and solely for their own benefit. Such provisions, therefore, have appeared in legislation on the subject, and they appear no longer. That is a very material circumstance, because it shews that the legislature have deliberately chosen not to introduce any such limitation of the power of debtors to present their own petitions. Mr. Muir Mackenzie was pressed with that circumstance himself, and he declined to say that in no case in which the debtor had no assets ought an adjudication to be granted on the debtor's own petition. He would not put his case as high as that; but he contended that in this case the adjudication ought not to be granted because this was a debtor in receipt of an inalienable pension, who was seeking to be made a bankrupt in order to get the undisturbed enjoyment of his pension without being liable to the pressure of a judge's order for the payment of the debt by instalments. But the same difficulty really presents itself there. We are invited to introduce into the granting of adjudications on a debtor's petition a condition which the legislature has not thought fit to insert, for to decide in that way would in fact be to say that no adjudication ought to be granted where the debtor who presents the petition is in receipt of an inalienable pension. It would have been perfectly easy for the legislature to have said so if they wished; but they have not done so, and we have no power to insert such a condition. I am strengthened in the view which I take (I admit, with reluctance) by the fact that such great judges as Knight Bruce, L.J., and Turner, L.J. (1), feeling the same reluctance that I do to applying the section to a case, where the petition was presented by the debtor without any view of benefiting his creditors, but solely for his own benefit, could not bring themselves to say that such was the law. Carefully looked at, the words of both the Lords Justices shew that if the question had been specifically raised—which it was

(1) In *Ex parte Hewitt, In re Drinkwater* (31 L. J. (Bank.) 83).

not, the appeal being against an order of discharge—they both would have felt great difficulty, in view of the express words of s. 86 of the Bankruptcy Act of 1861, in saying that the adjudication ought not to have been made in such a case. Under these circumstances I have come to the conclusion that we are not entitled to annul an adjudication made on a debtor's own petition merely because the debtor has no assets, nor because he is possessed of an inalienable pension, nor because, having no assets and being in possession of such a pension, he has presented his petition for the express purpose of preventing the application of the Debtors Act to compel him to pay this debt out of his pension. I am materially assisted in coming to this conclusion by the consideration of the severe provisions with regard to bankrupts which are found for the first time in the Act of 1883, especially with regard to the powers of the Court to refuse a discharge.

It seems to me that if it cannot rightly be said that the receiving order ought not to have been made because it was on a petition presented for a purpose foreign to the bankruptcy laws, we cannot, nor could the county court judge, annul it. For the reasons I have given I am unable to say that the petition was presented for a purpose foreign to the bankruptcy laws, and therefore I am unable to agree with the county court judge, and I think that this appeal must be allowed.

KENNEDY, J. I am of the same opinion, and I have but little to add to the judgment of my brother, in which I fully concur. No doubt the object of the debtor in this case in presenting his petition was to protect himself from the payment of this debt; but can we say in the words of the county court judge that that is a purpose so foreign to the administration of the bankruptcy law as to be an abuse of the process of the Court? I do not think that we can. No doubt in passing the Bankruptcy Act of 1883 the legislature had in view the interests of creditors and of the commercial community generally; but they had also regard to the interest of the debtor; and I think that although the primary object of a debtor is to shield himself against the remedies of his creditors by making himself a bankrupt, that in

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itself is not sufficient to deprive him of his right to an adjudication on his own petition.

There may be cases in which the debtor's object in presenting a petition is so distinctly foreign to the purposes of the Bankruptcy Act that it is a mere abuse of the process of the Court; but in my opinion this is not such a case, and I think that the adjudication ought to stand.

Appeal allowed.

Solicitor for appellant: *Maurice Mosely, for Weekes, Howlett & Co., Birmingham.*

Solicitor for respondent: *F. Jones, for Fallows & Cochrane, Birmingham.*

A. P. P. K.

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Nov. 19, 21.

[IN THE COURT OF APPEAL.]

GUILFORD *v.* LAMBETH.

County Court—Jurisdiction—Remitted Action—Counter-claim for Unliquidated Damages—Power to order Trial in County Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

An action of contract brought in the High Court, in which the claim indorsed on the writ does not exceed 100*l.*, can be ordered to be tried in the county court under s. 65 of the County Courts Act, 1888, although a counter-claim for unliquidated damages is set up.

Mackay v. *Bannister* (16 Q. B. D. 174) distinguished.

APPEAL from an order of a Divisional Court (Hawkins and Lawrance, JJ.), affirming an order of Mathew, J., at Chambers. (1)

The facts were as follows.

The action was brought to recover 32*l.*, the price of a mare sold by the plaintiff to the defendant. The plaintiff, having failed in an application for judgment under Order XIV., applied, before delivery of defence, under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, for an order that the action should be tried in the county court. On June 29 the master ordered the action to be tried in the county court at Kettering. On July 3 the defendant delivered a counter-claim, claiming 30*l.* for the keep of the mare, and for damages for breach of a warranty that the mare was quiet, the damages alleged being injury to

(1) [1894] 2 Q. B. 832.

the defendant's cart and harness caused by the kicking of the mare. The defendant appealed from the master's order of June 29. The appeal was heard on July 4 by Mathew, J., who was not informed that a counter-claim had been set up, and affirmed the master's order. The defendant appealed to the Divisional Court, who affirmed the order of Mathew, J. (1)

W. E. Hume Williams, for the defendant. There is no jurisdiction to order the action to be tried in the county court, under the County Courts Act, 1888, s. 65, there being a counter-claim for unliquidated damages. It is true that the case apparently comes within the words of the section; but the language of the section must be construed with regard to the history of the legislation and the decisions on the subject. In the case of *Mackay* v. *Bannister* (2), which was decided on the almost exactly similar provision in 19 & 20 Vict. c. 108, s. 26, it was held that an action could not be remitted to the county court if there was a counter-claim for unliquidated damages. The legislature, having after that decision employed the same phraseology in the Act of 1888, must be taken to have employed it with the same

(1) By 51 & 52 Vict. c. 43, s. 65, "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such court, as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

(2) 16 Q. B. D. 174.

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meaning. In *Knight* v. *Abbott* (1) it was said by Field, J., that s. 26 of 19 & 20 Vict. c. 108, was not merely a permissive but a restrictive enactment, and that it did not apply where the action was for unliquidated damages. In *Bassett* v. *Tong* (2) it was held that there is no power under s. 65 of the County Courts Act, 1888, to remit an action for unliquidated damages to the county court, even though the writ be indorsed with a claim for a specified sum not exceeding 100*l.* If the legislature withheld the power to remit actions for unliquidated damages on a contract to the county court, even although the sum claimed did not exceed 100*l.*, they could not have intended that counter-claims for unliquidated damages should be remitted. A counter-claim is really only a cross-action. If the decision in the Court below is right, then, where an action is brought for a liquidated sum of 20*l.* on a contract, the action can be remitted, although the defendant counter-claims 1000*l.* [He referred to Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 67, 89, 90; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18.]

Morton Smith, for the plaintiff, was not called upon to argue.

LORD ESHER, M.R. I think we must act on the words of s. 65 of the County Courts Act, 1888, taken according to their ordinary grammatical construction. Those words appear to be quite plain, and this case comes exactly within them. The action was one of contract in which the claim indorsed on the writ did not exceed 100*l.* That being so, by the terms of the section jurisdiction was given to the judge at chambers to order that the action should be tried in the county court. It is argued that that jurisdiction was taken away by reason of the defendant's having set up by way of defence this counter-claim. The defendant's contention is that any counter-claim, for however small an amount, and although such counter-claim is only really set up by way of defence, takes away the jurisdiction given by the section. Where are the words in the section which put any such limitation on the jurisdiction given by it? There are no such words. We cannot introduce such words unless there is some valid legal reason for doing so. It has been suggested that the

(1) 10 Q. B. D. 11. (2) [1894] 2 Q. B. 332.

history of the legislation on the subject affords such a reason in this case. That is an argument which I generally find to be used as a last resource. I do not say that in some cases, where the words used are ambiguous, the history of the legislation may not legitimately be resorted to in order to interpret them; but, where words are absolutely plain, it cannot justify us in introducing words into a section which are not to be found in it, or, in other words, legislating ourselves. It appears to me that, where the action originally comes within the words of s. 65, the judge has jurisdiction to order it to be tried in the county court, whatever may happen subsequently in the course of it. Therefore, in my opinion, however large a counter-claim may be set up in it, that cannot take away the jurisdiction that is given by the plain words of the section. An extreme case was put by the defendant's counsel in argument. It was suggested that in an action of contract for 20*l.*, a counter-claim for damages to the extent of 1000*l.* might be set up; and that, if there were jurisdiction to remit an action in a case like the present, the Court would in that case have jurisdiction to send to the county court the whole action, including the counter-claim for 1000*l.* I do not flinch from that result. The legislature having given the judge that jurisdiction in plain terms, he would have that jurisdiction. The question how he ought to exercise it is, however, quite another matter. If a judge really saw that there was likely to be a substantial counter-claim of that magnitude, and that it was not a mere sham, he would not order that the action should be tried in the county court. So that such a counter-claim would not affect the existence of the jurisdiction under s. 65, but would affect the exercise of it. In the present case, where the counter-claim is really only by way of defence to the action, and in any case is one of small amount and of the simplest kind, any judge would not hesitate to send the whole matter, both claim and counter-claim, to be tried in the county court. Certain authorities were cited to us. It was said that in *Knight* v. *Abbott* (1) Field, J., had said that a similar enactment in s. 26 of 19 & 20 Vict. c. 108, was a "restrictive" enactment, and it was argued that it ought to be construed strictly. I do not follow that contention. The

(1) 10 Q. B. D. 11.

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Lord Esher, M.R.

section appears to me to have been intended for the benefit of the parties ultimately interested in the litigation, and to be a beneficial not a penal enactment; so that, instead of requiring to be construed strictly, I think it ought to be construed as largely as the words fairly admit. Then we were referred to *Mackay* v. *Bannister*. (1) If that decision had been applicable to the section now before us, we should have had to consider whether we agreed with it. Even if it had been applicable to this section, it would not have been binding on us, and I am disposed to think I should not have agreed with it. But there is no occasion for us to overrule it. It was a decision on another Act of Parliament, which has been repealed, and it is no authority with regard to the construction of the Act now in question. I think this appeal must be dismissed.

LOPES, L.J. This was an action in the High Court, in which the plaintiff sought to recover 32*l.* for the price of a mare, and the defendant set up a counter-claim for damages for breach of warranty, the amount of which he specified as 30*l.* So both the claim and counter-claim were within the amount to which the jurisdiction of the county court extends, and, if the action had been brought in the county court, both of them could have been entertained and decided in that court. Now it is argued for the defendant that, because this counter-claim has been set up, the action having been commenced in the High Court, the action could not be sent down for trial in the county court. I think that there are two grounds upon which the defendant's contention must be held to fail. The first and less important ground is this: It is sought to set aside the order of the master and the judge on the ground that they had no jurisdiction; but, at the time when they made the order, there does not seem to have been any suggestion of this counter-claim made to them: all that was brought before them was the writ with the claim indorsed on it; so that, even assuming the construction of the section to be other than that which we are prepared to hold it to be, it could not be said that the master or the judge acted without jurisdiction in making the order. But there is another

(1) 16 Q. B. D. 174.

and more important ground. I read the 65th section of the County Courts Act, 1888, as in no way excluding the jurisdiction to make an order under it in cases where, as in the present case, there is a counter-claim for unliquidated damages. The section provides that "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto." This case comes within the very words of that provision. Then, if an order is made under the section, "the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." It appears to me that those words include a counter-claim, for a counter-claim is a proceeding in the action. It was said that in the case of *Mackay* v. *Bannister* (1) a contrary view was taken; but that decision did not apply to this Act, but to a similar section in an Act passed in 1856, when counter-claims were unknown. On that ground the case appears to me to be distinguishable. That Act has been repealed, and that decision is no authority for the construction of the section now in question. Another case referred to was *Bassett* v. *Tong*. (2) There it was held that the claim of a plaintiff for unliquidated damages could not be remitted under s. 65 to a county court for trial. But that decision has no application to the present case, where the claim of the plaintiff indorsed on the writ was for a liquidated amount. It appears to me that upon both the grounds which I have mentioned this appeal fails.

RIGBY, L.J. I agree with the view expressed by the other members of the Court as to the construction of s. 65. None of the authorities which were cited to us appear to me to be in point. The case of *Knight* v. *Abbott* (3) decided that, at the time when 19 & 20 Vict. c. 108, was passed, the words "indorsed on

(1) 16 Q. B. D. 174. (2) [1894] 2 Q. B. 332.
(3) 10 Q. B. D. 11.

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the writ" could only have one meaning, viz., specially indorsed under the Common Law Procedure Act, 1852. An action for unliquidated damages could not under s. 26 of 19 & 20 Vict. c. 108, be remitted to the county court merely because the plaintiff chose to indorse his writ in such action with a claim for a specified sum. That case cannot afford any guide for the decision of the question now before us. The decision in *Mackay* v. *Bannister* (1) had reference to an Act of Parliament passed at a time when there was no such thing as a counter-claim. Whether that case was rightly or wrongly decided, it does not seem to me to give us any assistance in construing the enactment now in question. *Bassett* v. *Tong* (2) raised an altogether different point from that involved in the present case. There the plaintiff was suing for unliquidated damages for breach of contract, and it was held that, under s. 65 of the County Courts Act, 1888, the action could not be remitted to the county court, though the writ was indorsed with a claim for a specified sum. It is not necessary for me to express any opinion whether that decision was correct; so I abstain from doing more than say that it throws no light on the present question.

Appeal dismissed.

Solicitors for plaintiff: *Pitman & Sons, for C. W. Lane, Kettering.*

Solicitor for defendant: *Newson.*

(1) 16 Q. B. D. 174. (2) [1894] 2 Q. B. 332.

E. L.

Applied. ST. AUBYN (L. M.) *v.* A.-G. (No. 2). [1951] 2 All E.R. 473.

[IN THE COURT OF APPEAL.]

C. A. 1894 Nov. 13, 15.

ATTORNEY GENERAL *v.* WORRALL.

Revenue—Probate—Account Duty—Gift of Personal Property—Mortgage Debt—Possession not assumed by Donee to the exclusion of Benefit to Donor—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*) —*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1.

By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, the description of personal property made subject to account duty under the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*a*), "shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise":—

Held, that it is not necessary, in order to bring a case within the above enactment, that the benefit to the donor should be by way of reservation out of the subject-matter of the gift.

Certain hereditaments had been mortgaged to the defendant's father, to secure a loan. The sum of 23,924*l.* remaining due upon the mortgage, by a deed made between the defendant's father, the mortgagors, and the defendant in 1886, it was witnessed that, in consideration of 575*l.* paid by the defendant to the mortgagors, and in further consideration of the covenant on the part of the defendant thereinafter contained, such covenant being accepted by the defendant's father in satisfaction of his mortgage debt, from which he thereby released the mortgagors and the defendant, the mortgagors and the defendant's father conveyed the mortgaged hereditaments to the defendant in fee simple, discharged from the mortgage debt, and the defendant covenanted to pay to his father an annuity of 735*l.* during his lifetime. The defendant's father died in 1890 leaving a will which was duly proved:—

Held, that the transaction carried out by the deed was a "gift" of the mortgage debt to the defendant by his father within the meaning of the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1; and that bonâ fide possession thereof had not been "assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of the section; and, therefore, that account duty was payable under s. 38 of the Customs and Inland Revenue Act, 1881, upon the property so given.

APPEAL from the judgment of a Divisional Court (Mathew and Cave, JJ.) upon an English information.

The facts, as appearing from the information and answer, were as follows.

By an indenture of mortgage dated May 13, 1881, made

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between Robert Sheild of the first part, Mary Sheild of the second part, Charlotte Sheild of the third part, and James Worrall, the defendant's father, of the fourth part, in consideration of 26,150*l.* (such sum being made up of 12,172*l.* 13*s.* 4*d.* paid by the said James Worrall to the said Robert and Mary Sheild, and of sums amounting to 13,977*l.* 6*s.* 8*d.* paid by the said James Worrall at the request of the said Robert Sheild and Charlotte Sheild to persons in whom existing mortgages of the after-mentioned property were previously vested) certain freehold and copyhold hereditaments were conveyed by the said Robert Sheild, Mary Shield, and Charlotte Sheild to the said James Worrall, subject to redemption on payment of the sum of 26,150*l.*, with interest thereon, on the day therein mentioned. The previously existing mortgage securities were transferred to James Worrall by other deeds. A portion of the mortgage debt of 26,150*l.* was paid off, but default being made in payment of the balance, James Worrall brought an action in the Chancery Division for foreclosure. It was found in that action that a sum of 23,924*l.* 15*s.* 2*d.* remained due to James Worrall upon the mortgage, and a period of six months was appointed within which the mortgagors were to make payment of the amount due, in default of which the foreclosure was to become absolute. Before the expiration of that period, by indenture dated January 12, 1886, and made between James Worrall of the first part, Mary Sheild of the second part, Robert Sheild of the third part, and the defendant Edward Worrall of the fourth part, after reciting that the defendant had agreed to purchase from the said Robert Sheild the said mortgaged hereditaments for the sum of 24,500*l.*, and that the said James Worrall had agreed to join in the conveyance for the purpose of releasing the premises from the mortgage debt in consideration of the covenant on the part of the defendant thereinafter contained, it was witnessed that in consideration of 575*l.* 4*s.* 10*d.* (being the difference between 24,500*l.* and 23,924*l.* 15*s.* 2*d.*) paid by the defendant to the said Mary Sheild (by the direction of the said Robert Sheild), and in further consideration of the covenant on the part of the defendant thereinafter contained, such covenant being accepted by the said James Worrall in satisfaction of his mortgage debt

of 23,924*l.* 15*s.* 2*d.*, from which he thereby released the said Robert Sheild, Mary Sheild, and the defendant, they the said Robert Sheild, Mary Sheild, and James Worrall did thereby convey to the defendant, his heirs and assigns, the aforesaid lands and premises discharged from the indenture of May 13, 1881, and from the principal moneys and interest secured thereby. By the same indenture the defendant covenanted with his father James Worrall to pay to him during his life the yearly sum of 735*l.* by equal half-yearly payments on June 24 and December 25 in every year.

James Worrall died on July 12, 1890, and on September 23 his will with two codicils was duly proved in the district registry at Manchester. By the first of the said codicils, dated April 26, 1890, the testator declared that the sum of 39,900*l.*, which he stated that he had paid to or applied for the benefit of the defendant, should be taken as a satisfaction to that extent of the share or portion directed by the testator's said will to be held in trust for him and his issue. After the death of James Worrall the Commissioners of Inland Revenue claimed account stamp duty on the before-mentioned sum of 23,924*l.* 15*s.* 2*d.* from the defendant under s. 38, sub-s. 2 (*a*), of 44 & 45 Vict. c. 12, extended by s. 11, sub-s. 1, of 52 & 53 Vict. c. 7, and also estate duty under 52 & 53 Vict. c. 7, s. 5, which the defendant refused to pay.

The Divisional Court gave judgment for the Crown. (1)

(1) By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—(*a.*) any property taken as a donatio mortis causâ made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased . . . (*c*) any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11,

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Byrne, Q.C., and *T. Willes Chitty*, (*F. G. Newbolt*, with them), for the defendant. First, it is contended that the subject-matter of the transaction between the defendant's father and the defendant carried out by the deed of 1886, whether a gift or a sale, was realty, and therefore does not come within 44 Vict. c. 12, s. 38, or 52 & 53 Vict. c. 7. The father cannot be said to have given his son, and the son cannot be said to have assumed possession of and retained the mortgage debt, which was extinguished by the deed. What the father really passed to the son, and what the son assumed possession of and retained, was the land. Suppose, instead of carrying out the transaction in this form, the father had by one deed released the debt to the mortgagors, and they had conveyed their interest to the son, and the father had then by another deed conveyed to the son; or suppose the father had gone on with the foreclosure proceedings, and obtained a decree absolute for foreclosure, and then conveyed to the son. Clearly the transaction between the father and the son would then have been a conveyance of the land. But in substance the transaction here was the same.

Secondly, assuming that the conveyance by the father was of the mortgage debt, and therefore of personalty, it was not a gift, but a sale, inasmuch as it was made for valuable consideration, viz., the defendant's covenant to pay the father an annuity during his life. If there is a substantial consideration the Court cannot go into the question of its adequacy. The transaction is not in law a gift. It is a sale of a chose in action, viz., the mortgage debt. Thirdly, assuming that the transaction was a gift, it is contended that what the legislature aimed at by 52 & 53 Vict. c. 7, s. 11, sub-s. 1, was a gift where the donor reserves something for himself out of the property given. The meaning is that, to

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sub-s. 1: "Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

escape liability to the duty, there must be a gift out and out; the donor must not pretend to give and keep part of the property back. In this case the donor cannot be said to have retained any interest in the property conveyed. He parted with it, whatever it was, out and out. The annuity was not charged on the property conveyed to the son. The debt was wholly extinguished, and the father took the personal liability of the son on the covenant. That is not a transaction within the words of 52 & 53 Vict. c. 7, s. 11, sub-s. 1. How can the father be spoken of as "excluded" from or as "retaining" any interest in the mortgage debt which ceased to exist?

Sir R. T. Reid, A.G., and *Vaughan Hawkins*, for the Crown. The provisions of 44 & 45 Vict. c. 12, s. 38, and 52 & 53 Vict. c. 7, s. 11, were passed for the purpose of extending, and preventing evasions of, the law with regard to probate duty. It is submitted that it is clear from the language of s. 11, sub-s. 1, of the latter Act that it was carefully framed so as to avoid the defect which had been found to exist in the provisions of s. 38, sub-s. 1 (*c*), of the former Act, viz., that in order to bring the case within that sub-section there must have been a reservation out of the subject-matter of the gift. Under the words of the later Act it is not necessary that the benefit should be by reservation out of the subject-matter of the gift. In order to escape the duty there must not be any benefit to the donor by contract or otherwise.

It is contended for the defendant that this is not a gift because of the covenant by the defendant. The collateral contract by the defendant to pay an annuity to his father does not render the transaction the less a gift by the father within the section. The wording of s. 11, sub-s. 1, of 52 & 53 Vict. c. 7, shews that the legislature contemplated a case where there was such a collateral contract as a gift. If the contention of the defendant on this point were held to be correct, the duty might easily be evaded. Then, assuming this to be a gift, was it a gift of realty or personalty? At the time when the indenture of 1886 was executed the state of things was this. The equity of redemption was still vested in the mortgagors, and, therefore, although the legal estate was in the defendant's father, in equity the land belonged to them subject to the mortgage debt. The mortgage debt

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belonged to the father, and he could dispose of it. That being so, the son buys the equity of redemption, and the father in reality gives him the amount of the mortgage debt. The father never had the equity of redemption, and, therefore, could not pass it to the son. The son bought it from the mortgagors.

Byrne, Q.C., for the defendant, in reply.

LORD ESHER, M.R. It has been held that in cases of this kind the Court has to determine what the real nature of the transaction was, apart from legal phraseology and the forms of conveyancing. In this case James Worrall, the father, had lent to certain persons named Sheild a sum of money on a mortgage of real estate. The effect of that was that he became the owner of the legal estate in the land, but in equity the mortgagors remained the owners of the property, he being merely entitled to the payment of the mortgage debt, and interest thereon, in accordance with the mortgage deed. If the mortgagors made default in such payment, the mortgagee could take proceedings to obtain a foreclosure, and so become legal and equitable owner of the property. The mortgagors appear to have made default; and thereupon the defendant's father took proceedings for foreclosure, and an order was made, the effect of which was that he would not become equitable owner of the property unless the mortgagors made default in payment of the amount due within six months. Till that period had elapsed all that in equity he was entitled to was payment of the mortgage debt and such interest as might be in arrear. If this transaction between the father and son had not taken place, and the father had died within that period, there is no doubt that the right to the sum due on the mortgage would have passed to his executors as personalty. That being the position of affairs at the time when this transaction between the father and son took place, the question is, what was its real nature? It appears to me in truth to have been this. The father being entitled to the mortgage debt of 23,924*l.* so charged on the land, and the son having a sum of 575*l.* of his own, it was arranged that the son should with that sum purchase the equity of redemption from the mortgagors, and the father should give him the amount of the mortgage

debt, and in that way the son should become entitled to the whole of the property free from the mortgage debt. Then the father stipulates that the son shall covenant to pay to him an annuity of 735*l.* That being, in my opinion, in reality the nature of the transaction, how was it carried into effect in point of form? The parties enter into a deed, the terms of which appear to me to import what I have already stated to be the truth of the matter—viz., that the father intended to make a gift to the son of the amount of the mortgage debt, and the son intended to give to the mortgagors 575*l.* for the equity of redemption. The mortgagors, in consideration of that sum, convey to the son the equity of redemption, and the father releases the mortgage debt, which, in plain English, means that he gives it to his son. Then by the same deed, and obviously as part of the same transaction, the son covenants to pay to the father an annuity of 735*l.* during his lifetime. The law being that for this purpose we are to look to the truth or substance of the transaction, does this transaction so regarded come within the statutes relied on by the Crown? I think that it comes within s. 11, sub-s. 1, of the amending statute of 1889. It was, in my opinion, a "gift" within that enactment. I have already said that what was given was the mortgage debt, which was personal property. Also, I think that possession of the property was not assumed and retained by the donee "to the entire exclusion of any benefit to the donor by contract or otherwise." It appears to me that the covenant by the son to pay an annuity to the father prevented this from being a pure and simple gift, and, therefore, it comes within the statutes. For these reasons I think the appeal should be dismissed.

LOPES, L.J. I am of the same opinion. It is clear that in deciding questions of this kind we have to look at the substance of the transaction, but, whether we look at the substance or the form of this transaction, it seems to me that the Crown is entitled to succeed. Three questions are raised. One question is whether in this case there was a "gift" of property at all. It is suggested that there was not, because there was a collateral covenant by the son to pay to the father an annuity. It appears to me

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that there was not the less a gift within the meaning of the Act on that account.

Another question is whether the gift was one of realty or of personalty. To determine that we must look at the state of things existing at the date of the deed. At that time the land was subject to a mortgage for 23,924*l.*, and the father, who was the mortgagee, had obtained an order for foreclosure, which, however, would not be absolute till after the lapse of six months. So at that time the mortgagors were still entitled to the equity of redemption, and the mortgagee was entitled to the legal estate and to the money secured by the mortgage. That being so, what was the transaction carried out by the deed? The mortgagors receive 575*l.* in consideration of their conveying the equity of redemption. The father conveys the legal estate and releases the mortgage debt. I am unable to say that it was in substance realty that the father gave to the son. The father could not then pass the equitable interest in the land, for it was not vested in him. He could no doubt pass the legal estate; but what he really passed was the mortgage debt. It seems to me, therefore, that there was a gift of personalty. In my opinion the test suggested during the argument is a good one, viz., that if the father had died before the order for foreclosure became absolute, the mortgage debt would have passed to his executors. The third question was whether this property was personalty passing to the son in such a manner as to come within the provisions of the statutes relating to account duty and estate duty. This depends on the provisions of two statutes, viz., the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), and the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7). There was a defect in the provisions of s. 38, sub-s. 2 (*c*), of the earlier Act, viz., that, in order to bring a case within it, there must be a reservation out of the subject-matter of the gift. It appears to me clear that s. 11, sub-s. 1, of the subsequent Act of 1889 was worded as it is with the express purpose of avoiding that defect. It provides that the description of property marked (*a*) in the former enactment shall "include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee imme-

diately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." As I read that provision it is not necessary that the benefit to the donor should be by way of reservation, but any benefit to him by contract or otherwise will suffice to bring the case within the enactment. Applying that construction of the words to the present case, it seems to me impossible here to say that there was no benefit to the donor by contract or otherwise within the meaning of the Act. I think that there was clearly in this case such a benefit by contract as was contemplated by the section.

A. L. SMITH, L.J. I am of the same opinion. The question raised in this case is whether the defendant is liable to pay the duty claimed on this amount of 23,924*l.* That depends in the first place on the question whether the subject-matter dealt with by this transaction between the father and the son was personalty or realty. If it was not personalty but realty, it is conceded that the duty is not payable. I had at first a difficulty as to this question, but the argument of the Attorney General has satisfied me with regard to it. The matter stands thus. The father, James Worrall, had lent to the Sheilds a sum of money on mortgage. On this mortgage a sum of 23,924*l.* remained due. The father took proceedings to obtain foreclosure, and an order for foreclosure had been obtained, which, however, was not to be absolute unless the mortgagors failed to pay the amount due within six months. Within that period this transaction took place, which in substance appears to have been as follows. The son purchases the equity of redemption from the mortgagors, and the father then conveys the legal estate to the son and releases the mortgage debt which, if the son only stood in the shoes of the mortgagors, would still be charged on the land, in consideration of the son's covenanting to pay him an annuity. Does the transaction between the father and son in substance relate to realty or personalty? I think that it is really a release of the mortgage debt which is personalty and nothing else.

The next point is this. It is said that the transaction is not

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a gift within the meaning of the statute because a consideration was given. On reading s. 11, sub-s. 1, it seems clear that the legislature in using the word "gift" in that section contemplated cases where the donee enters into a covenant such as this.

Thirdly, it was argued that, as there was no benefit retained by the donor out of the subject-matter of the gift, the case did not come within the sub-section. But I do not so read the enactment. It appears to me that it was framed expressly for the purpose of making the net wider than it had been under the former Act. Therefore I think that all the points taken for the defendant fail, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor for Inland Revenue.*

Solicitors for defendant: *Byrne & Blakiston, for Slater, Heelis & Co., Manchester.*

E. L.

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[IN THE COURT OF APPEAL.]

WEGG PROSSER *v.* EVANS.

Joint Contractor—Guarantee by two jointly—Cheque given in respect of, by one of Joint Contractors—Unsatisfied Judgment on Cheque—Action against Joint Contractor on Guarantee—Res Judicata.

An unsatisfied judgment against one joint contractor, on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.

The defendant and T. jointly guaranteed to the plaintiff the payment of rent by a tenant of the plaintiff's. A half-year's rent being in arrear, T. gave the plaintiff his cheque for the amount. The plaintiff sued T. on the cheque, and recovered judgment, but such judgment was not satisfied. The plaintiff then sued the defendant on the guarantee:—

Held (affirming the judgment of Wills, J.), that, the causes of action upon the cheque and upon the guarantee not being the same, the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504) did not apply, and the judgment against T. afforded no defence to the action.

Drake v. *Mitchell* (3 East, 251) followed.

Cambefort v. *Chapman* (19 Q. B. D. 229) overruled.

APPEAL from the judgment of Wills, J., at the trial without a jury. (1)

(1) [1894] 2 Q. B. 101.

The action was upon a guarantee. The facts were as follows. The defendant had jointly with one Thomas guaranteed to the plaintiff due payment of the rent of a farm let by the plaintiff to one Williams. Default being made by Williams in payment of a half-year's rent, an application for such rent was made to Thomas by the plaintiff's agents, to whom Thomas gave his cheque for the amount. The cheque being dishonoured, the plaintiff brought an action against Thomas on the cheque in which he recovered judgment. Execution was issued on the judgment, but it was not satisfied. The plaintiff then brought the present action against the defendant upon his guarantee. The learned judge at the trial gave judgment for the plaintiff.

J. E. Bankes, and *Æ. Mackintosh*, for the defendant. The question in this case is concluded by the decisions in *King* v. *Hoare* (1) and *Kendall* v. *Hamilton*. (2) The contract of the defendant was a joint contract, and he therefore had a right to have the other joint contractor joined as a defendant in an action upon it. If the plaintiff had put it out of his power to sue Thomas on the guarantee, he could not sue the defendant. The plaintiff, by suing and recovering judgment on the cheque against Thomas, prevented himself from suing him on the guarantee, and therefore cannot sue the defendant. It is a principle of the law that a man cannot be twice sued for the same cause. It may be admitted that the cause of action on the cheque is in form different from that on the guarantee, but in substance it is the same; the debt upon the cheque is the same in reality as that on the guarantee; payment of the cheque would have been payment of the guarantee. The plaintiff, having obtained a judgment for that debt against Thomas, could not sue him again in respect of it; and, if he did, Thomas could plead the judgment recovered on the cheque in bar. That judgment extinguished the cause of action on the cheque and the consideration for it. *Cambefort* v. *Chapman* (3) is directly in point.

The learned judge below relied on *Drake* v. *Mitchell*. (4)

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 19 Q. B. D. 229.
(4) 3 East, 251.

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Some of the observations of the judges in that case appear, no doubt, to be in conflict with *Cambefort* v. *Chapman* (1); but these were really obiter, for that case differed from *Cambefort* v. *Chapman* (1), and from the present case, inasmuch as the original debt in that case was a specialty debt, and the technical rule that the giving of a bill of exchange could not suspend the remedy on a covenant applied. If that decision is applicable, it must be taken to have been overruled by *King* v. *Hoare* (2) and *Kendall* v. *Hamilton.* (3) [He also cited *Bridges* v. *Berry* (4); *In re Hodgson* (5); Byles on Bills, 15th ed. p. 311.]

A. T. Lawrence, for the plaintiff. The judgment in this case is not in conflict with *King* v. *Hoare* (2) or *Kendall* v. *Hamilton.* (3) There was nothing to prevent the joinder of Thomas as a defendant, if the defendant had required the plaintiff to join him. An unsatisfied judgment on a cheque given by way of conditional payment cannot be pleaded in bar to an action for the original debt, because there is no merger of the original debt in the judgment on the cheque. An application might be made to the Court in the exercise of its equitable jurisdiction to stay the second action if brought vexatiously, but no plea of merger could be sustained. The doctrine of merger of the original cause of action in the judgment only applies to the particular cause of action sued upon. There can be no merger in this case, the cause of action on the cheque being wholly distinct from that on the guarantee. *Drake* v. *Mitchell* (6) is clearly to the effect that, where a cheque is given as a collateral security, a judgment upon it does not extinguish the original debt, unless the judgment has been satisfied. That case has not been overruled by *King* v. *Hoare* (2) or *Kendall* v. *Hamilton* (3), with both of which decisions it is quite consistent. In the passage in Byles on Bills, 15th ed. p. 311, relied on by the defendant, by "original debt" the learned author means the original debt on the bill or note, not the debt which formed the consideration for it, as is clearly shewn by the context. If the construction of the passage be otherwise, it is not borne out by the authorities cited

(1) 19 Q. B. D. 229.
(2) 13 M. & W. 494.
(3) 4 App. Cas. 504.
(4) 3 Taunt. 130.
(5) 31 Ch. D. 177.
(6) 3 East, 251.

for it. The ground of the decision in *Bridges* v. *Berry* (1) was that the plaintiff by his laches in not giving notice of dishonour of the second bill of exchange had prejudiced the defendant, and therefore had discharged him from liability on the first as well as the second. In the present case the defendant was in no way prejudiced by the transaction with regard to the cheque.

J. E. Bankes, for the defendant, in reply. The effect of the cases is that, in considering the question whether the cause of action is the same for this purpose, the Court will look not to the mere form, but to the substance of the thing, and, where the complaint in both actions is substantially the same, the plaintiff cannot sue a second time. The complaint here is substantially the same in both actions, viz., non-payment of the same amount: *Phillips* v. *Berryman* (2); *Routledge* v. *Hislop* (3); *Brunsden* v. *Humphrey*. (4)

LORD ESHER, M.R. In this case the plaintiff was the owner of a farm which he had let, and, being doubtful of the tenant's ability to pay his rent, he took a guarantee from the defendant and one Thomas that the rent would be paid. The guarantee was joint, not joint and several. The tenant did not pay rent that was due; and thereupon the guarantee became effective, and the plaintiff had a right of action upon it. That action ought, no doubt, to be a joint action against both of the guarantors. If in such a case an action were brought against one of the two joint contractors only, he might, under the old system, have pleaded in abatement, and so enforced the joinder of the other; and since the Judicature Act, pleas in abatement having been abolished, the same result could be brought about by an application for an order to enforce joinder of the other joint contractor. The plaintiff, however, did not at that time bring an action against the guarantors or either of them. He took a cheque for the amount of the rent due from Thomas. By so doing he did not give time to the principal debtor, or do any injury to the present defendant. The cheque was not by itself a satisfaction of the debt. It was given by way of what has

(1) 3 Taunt. 130.
(2) 3 Doug. 287.
(3) 29 L. J. (M.C.) 90.
(4) 14 Q. B. D. 141.

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been styled a conditional payment. If the cheque had been paid, it would have been payment of the debt on the guarantee, and that payment would have no doubt prevented the plaintiff from suing the defendant. The defendant would thereupon have become liable to an action by Thomas for contribution; but no additional expense would be occasioned to him through the giving and payment of the cheque, and his position would not be altered thereby in any way. But the cheque was dishonoured, and Thomas did not pay it. Thereupon the plaintiff sued him upon the cheque. The cause of action in that action was the dishonour of the cheque, and upon that the plaintiff recovered judgment. If that judgment had been satisfied, and the plaintiff had obtained the fruits of it by execution, that would have been equivalent to payment of the debt on the guarantee; but it has not been satisfied. The present defendant has not been in any way injured by the transaction with regard to the cheque. He would not be liable to bear any of the costs of the action upon it, nor is his position altered for the worse in the smallest degree. All that has happened, so far as he is concerned, appears to be that probably he has not been called upon to pay under the guarantee so soon as he otherwise might have been. It is contended, nevertheless, that the rule of law on the subject is that by reason of this transaction with regard to the cheque which took place between the plaintiff and Thomas, and which did not prejudicially affect the defendant in any way, the plaintiff cannot now sue the defendant on the guarantee. To my mind, if the rule were as alleged, it would be a technicality of the most stringent kind, and one which would make the law on the subject contrary to the justice and truth of the matter. I for one object to such a technicality and will not act upon it, unless I am obliged to do so by authority. If I were bound by the authority of decided cases, of course I should bow to that authority; but we ought, I think, to look very closely at the cases on the subject to see whether we are bound by authority to hold that there is such a technical rule as is suggested. It is no doubt the law that, if the plaintiff had sued Thomas alone on the guarantee and not on the cheque, and had recovered judgment against him, he could not afterwards

have sued the present defendant. If that had been the case here, I should have been bound by a technical rule of law which has existed so long that I must bow to it. But in the present case the plaintiff did not sue Thomas on the guarantee, but on the cheque. Is there any case which decides that, where a judgment is recovered against one of two joint contractors, not on the original contract, but on a cheque given by him as this was, the action against the other joint contractor is barred? The case of *Drake* v. *Mitchell* (1) appears to me to be absolutely to the contrary effect. That was decided by four judges who were eminently well acquainted with the common law of England and with business. Lord Ellenborough, C.J., said in that case: "I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Anything plainer than these expressions there cannot be. In this case no judgment had been recovered against Thomas in respect of the particular cause of action on which the defendant is sued, viz., the breach of the guarantee. Thomas was not sued upon that cause of action, but on another, viz., non-payment of the cheque. But it was said that *Cambefort* v. *Chapman* (2) was to the contrary effect. I do not think it can be denied that that case conflicts with *Drake* v. *Mitchell*. (1) That being so, the question is which we ought to follow. The decision in *Drake* v. *Mitchell* (1) was given in 1803, and has stood from that time till 1887, when *Cambefort* v. *Chapman* (2) was decided. I think that that alone is a ground for giving a preference to the older decision; but from what I have said it will be obvious that my judgment goes with that decision and not with the later one. Therefore I think we should follow the decision in *Drake* v. *Mitchell* (1), unless there is some authority binding upon this Court by which it has been overruled. I do

(1) 3 East, 251.

(2) 19 Q. B. D. 229.

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not think there is any such authority. I do not think that the House of Lords intended by their judgment in *Kendall* v. *Hamilton* (1) to overrule the decision in *Drake* v. *Mitchell*. (2) The defendant not being prejudiced in any way by what took place with regard to the cheque, in my view of the case it could only be some mere technical rule of law that could produce what to my mind would be the unjust result of releasing the defendant from liability upon his contract; and there is, in my opinion, no authority which obliges me to say that there is such a rule of law. It was said that the defendant had a right to have Thomas joined as a co-defendant in the action, and that he could not have him joined because of what took place with regard to the cheque. But it appears to me that the hypothesis on which this argument is based is incorrect. It follows from what I have said that the defendant, if he thought it worth his while, had a right to call on the plaintiff to join Thomas; and Thomas could have made no valid objection to being joined, nor the plaintiff to joining him. I think that this case is governed by the decision in *Drake* v. *Mitchell* (2), and that *Cambefort* v. *Chapman* (3) was wrongly decided. For these reasons I think that the appeal should be dismissed.

LOPES, L.J. If it were not for the fact that we are differing from the decision in *Cambefort* v. *Chapman* (3), I should not have thought it necessary to add anything to what the Master of the Rolls has said. The question which we have to decide is whether an unsatisfied judgment against one of two joint contractors in an action upon a cheque given by him as conditional payment is a bar to an action against the other joint contractor on the original contract. It appears to me that that question must be answered in the affirmative, if the judgment recovered against one of the joint contractors is in respect of the same cause of action as that in respect of which the other is sued; in the negative if it is not. The question, therefore, is whether the cause of action in respect of the cheque was the same as that in respect of the guarantee. It seems obvious that the two causes

(1) 4 App. Cas. 504. (2) 3 East, 251.
(3) 19 Q. B. D. 229.

of action are entirely different. The pleadings would be different, and different questions of law and fact might arise and have to be determined, in the two actions respectively. It is to be observed that in the action on the cheque Thomas could not have claimed that the defendant should be joined as a co-defendant, whereas in an action on the guarantee he could. It appears to me that the decision in *Drake* v. *Mitchell* (1) is applicable to this case. I cannot see how that case can be distinguished from the present. It was there held that where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, such judgment was no bar to an action of covenant against the three, such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted in satisfaction, nor to have produced it in fact. The Master of the Rolls has referred to the judgment of Lord Ellenborough. Grose, J., said: "The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security; and, though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant." The judgments of Lawrence, J., and Le Blanc, J., are equally clear to the same effect. Every word of these judgments is applicable to the present case. It was said that that case was in conflict with the case of *Cambefort* v. *Chapman*. (2) I think it is. The question is which we are to follow. The case of *Drake* v. *Mitchell* (1) was decided by judges of high authority, and has stood for eighty-four years unquestioned, which is of itself a strong ground for following it; but I must say that my own reason goes with the conclusion arrived at by the judges in that case; and, if there had been no such case, I should have thought that the principle there laid down was the correct one. I observe that Lindley, L.J., in his work on Partnership (3), alludes to the case of *Cambefort* v. *Chapman* (2), and expresses a doubt whether it was correctly decided. Furthermore, I may perhaps be permitted to say that we have mentioned the present case to him,

(1) 3 East, 251.
(2) 19 Q. B. D. 229.
(3) Lindley on Partnership, 6th ed. p. 263.

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and he has expressed to us a strong opinion that the decision in *Cambefort* v. *Chapman* (1) was wrong. I think, therefore, that that case must now be considered to be overruled. It was suggested that the defendant has a ground of complaint in that he could not have Thomas joined as a co-defendant. It seems to me that it was his own fault that that was not done, and that he had the means of compelling such joinder if he had wished it. For these reasons, I come to the conclusion that the judgment is right and should be affirmed.

RIGBY, L.J. The first question involved is that which appears to have been dealt with by Field, J., in *Cambefort* v. *Chapman* (1), viz., whether there was a merger of the joint cause of action against both the joint contractors in the judgment on the several cause of action against one only. That question seems to me to answer itself. The joint cause of action is essentially different from the several cause of action. The main question in *Kendall* v. *Hamilton* (2) was whether there was not a several as well as a joint cause of action. If there had been, it seems to have been conceded, rightly or wrongly, by the defendant that he could be sued, though in the action against his partners on the joint cause of action judgment had already been recovered; and yet in that case both the causes of action would clearly have come within the test which the counsel for the defendant in this case sought to establish as the result of the cases cited by him in reply, as they both would have arisen out of the same subject-matter and in respect of substantially the same debt. A judgment on the joint cause of action against the joint contractors is a totally different thing from a judgment on a several cause of action that exists as against one of them only. There was a separate cause of action against Thomas on the cheque which is entirely distinct from the joint cause of action against the two guarantors. In order that the doctrine of merger may apply, the causes of action must be the same in each case, i.e., not only must they be concerned with the same subject-matter, but the parties to them must be the same. On the question of merger, therefore, I entertain no doubt that the joint cause of action against the

(1) 19 Q. B. D. 229. (2) 4 App. Cas. 504.

guarantors was not merged in the judgment on the separate cause of action against one of them in respect of the cheque.

But there is another ground on which, if it could be established, the judgment for the plaintiff in this case could be attacked, and that is the ground put forward by Manisty, J., in *Cambefort* v. *Chapman* (1), i.e., that the claim on the guarantee was extinguished as against Thomas by the judgment obtained against him upon the cheque. The question whether that was so appears to me a serious one, for not only does the judgment of Manisty, J., proceed on those lines, but, as I read the passage in Byles on Bills (2), he also lays it down that the judgment recovered on a cheque against one of two joint contractors, as in the present case, is an extinguishment of the original debt in respect of which it was given. But on carefully considering the authorities cited by him for that proposition, I do not find that they give any substantial support to it; and we have, on the other hand, the clear judgment in the case of *Drake* v. *Mitchell* (3), in which the full Court of Queen's Bench held that there was in such a case no extinguishment of the joint debt. There is a difference, no doubt, between that case and *Cambefort* v. *Chapman* (1), which was relied on as leading to the conclusion that the two decisions could stand together; but on examining the case of *Drake* v. *Mitchell* (3) I do not find that it proceeds exclusively on any such distinction as that the original contract in that case was a specialty contract. Each of the judges seems to make it clear, that, where there is a collateral security given by means of a separate contract by one of the joint contractors, the only way in which it can be made out that the original debt has been thereby extinguished is by shewing that there has been a real satisfaction of it, and that it is not enough to shew merely that a judgment has been obtained on the separate contract which remains unsatisfied. I therefore come to the conclusion that there is strong authority for the proposition that a judgment against one of the joint contractors, on a separate obligation such as a bill of exchange or cheque, does not work an extinguishment of the joint debt, unless there has been a real satisfaction of it under

(1) 19 Q. B. D. 229. (2) 15th ed. p. 311.
(3) 3 East, 251.

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Rigby, L.J.

the judgment; and that, finding nothing really to the contrary but the judgment of Manisty, J., in *Cambefort* v. *Chapman* (1), and the statement in Byles on Bills, we are bound by the decision in *Drake* v. *Mitchell* (2); or, if not strictly speaking bound by it, we ought to treat it as representing the true state of the law on the subject.

The only remaining point is this. When it is established that the mere judgment in the action on the cheque was no satisfaction of the joint contract of the guarantors, the question arises how it came about that Thomas was not sued jointly with the defendant. It was involved in the decision in *Kendall* v. *Hamilton* (3) that it remains the substantial right of one joint contractor not to be sued without the other. But it is at his option whether he will raise any such defence or not. In the case of a plaintiff's suing only one of two joint contractors, the defendant could originally have pleaded in abatement, and since the Judicature Act he can take other means to enforce the joinder of the other joint contractor. Here no such step was taken. If the defendant had taken the proper steps I think the plaintiff could not have obtained judgment against the defendant without joining Thomas. He chose not to take such steps, and, consequently, judgment was rightly given against him alone.

Appeal dismissed.

Solicitors for plaintiff: *Woodcock, Ryland, & Parker, for E. M. Underwood, Hereford.*

Solicitors for defendant: *Wrentmore & Sons, for Morgan, Rhys, & Bruce, Pontypridd.*

(1) 19 Q. B. D. 229. (2) 3 East, 251.
(3) 4 App. Cas. 504.

E. L.

[CROWN CASE RESERVED.]

1894
Nov. 10, 17.

THE QUEEN *v.* BROWN.

Gaming—Betting House Acts—Bets made by Letter or Telegram—"Resorting" to House—Criminal Law — Practice — Offence Punishable on Summary Conviction—Election of Accused to be tried by Jury—Adding Counts to Indictment for Offences not included in Summons—Betting House Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 3—*Indictable Offences Act*, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 25—*Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43)—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17—*Vexatious Indictments Act*, 1859 (22 *&* 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act*, 1867 (30 *&* 31 *Vict. c.* 35), *s.* 1.

Upon the trial of an indictment, under s. 1 of the Betting House Act, 1853, for keeping a house for the purpose of betting with persons resorting thereto, it is unnecessary to shew that such persons have physically resorted to the premises, the purpose for which the house is kept being that which is condemned by the section, and the offence may be proved by shewing that the house was opened and advertised as a betting-house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered in support of such an indictment, there must be evidence of a physical resorting, and it is not sufficient to shew that letters and telegrams were sent to the accused directing him to make bets with the senders; persons sending such letters and telegrams do not resort to the house within the meaning of the section.

Where an accused person, summoned before justices in respect of an offence triable summarily, elects, under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury, the subsequent procedure before justices is the same as that which is applicable to the case of indictable offences, and not that applicable to summary proceedings. The accused person may therefore be committed to take his trial in respect of any indictable offence disclosed by the depositions; and in cases not falling within the Vexatious Indictments Act, or in which the operation of that Act is limited by 30 & 31 Vict. c. 35, s. 1, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although the accused was not summoned before the justices in respect of such offence.

CASE stated by the recorder of Plymouth.

The defendant was tried upon an indictment containing four counts for offences against s. 1 of the Betting House Act, 1853 (16 & 17 Vict. c. 119). The indictment commenced with a prefatory averment that the defendant had been charged before a court of summary jurisdiction with the offences charged in the several counts of the indictment, and had, before the charges

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were gone into, claimed to be tried by a jury. The first count charged the defendant, as the occupier of a certain house and rooms therein, with having on April 17 and 18, 1894, opened, kept and used the said rooms in the said house for the purpose of betting with persons resorting thereto. The second count charged him as such occupier with having on the same days opened, kept and used the said rooms in the said house for the purpose of money being received by and on behalf of him as and for the consideration for an undertaking, promise, and agreement to pay thereafter money on the contingency of and relating to horse-races. The third and fourth counts varied the charges in the first and second, by charging the defendant, not as the occupier of the house and rooms, but as a person using them.

Before the defendant pleaded it was objected on his behalf that the indictment was bad, because each count alleged a different offence from that with which the defendant was charged before the magistrates, or because it contained counts for other offences than that with which he was charged before them. It was proved that the defendant had been summoned before the magistrates to answer an information which charged him with having on April 17 and 18, 1894, being then the occupier of a certain house, unlawfully used the said house for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races; and that the defendant, having appeared to the summons, elected to be tried by a jury. The magistrates then proceeded to hear the charge, which was stated in the depositions in the same terms as in the information. The evidence taken before the magistrates was sufficient to support all the four counts in the indictment. The learned recorder held that the indictment was good, but agreed to state a case for the opinion of the Court. The defendant then pleaded not guilty.

It was proved that the defendant was occupier of a house in Plymouth, and that he used the house for the purpose of betting with any persons who wrote or telegraphed to him asking him to bet with them; also that he used it for the purpose of money being received on his behalf as and for the consideration for an agreement to pay thereafter money on the event of a horse-

race. There was no evidence that any person had actually gone to the house for the purpose of betting with the defendant other than those who had gone to pay money under the circumstances described in the second count of the indictment. It was objected that there was no evidence of the defendant having betted with persons resorting to the house. The learned recorder directed the jury that it was not necessary for a conviction under the first count that the defendant's house should have been used for the purpose of betting with persons who physically came to the house; but that if the house were used by the defendant as an office to which any persons who wished to bet with him were to send their communications, and if persons were in the habit of sending letters and telegrams to him there directing him to make bets with them, such persons resorted to the house within the meaning of the Act, and the jury might find the defendant guilty of using the house for betting with persons resorting thereto; he further directed the jury to give separate verdicts upon the first and second counts. The jury found the defendant guilty upon those counts, and he was sentenced to a fine of 300*l.* upon the first, and a fine of 100*l.* upon the second, count. It was objected, upon the defendant's behalf, that the learned recorder had no jurisdiction to sentence him to a greater fine than 100*l.*, or to more than one penalty.

The questions for the Court were:—

1. Whether the indictment was bad for not alleging the same offence as that in respect of which the defendant had claimed to be tried by a jury; or for containing more than one count; or for containing a count differing from the charge upon which the defendant had been brought before the magistrates.

2. Whether the defendant could be guilty of using his house for betting with persons resorting thereto, although such persons only sent letters and telegrams to the house and did not personally come there.

3. Whether the recorder had jurisdiction to fine the defendant more than one penalty of 100*l.*

If the Court answered the first question in the affirmative, the judgment was to be reversed and the defendant acquitted.

If the Court answered the first question in the negative, and

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either the second or third questions also in the negative, the defendant was to be acquitted on the first count, and judgment was to stand upon the second count that the defendant be fined 100*l.* (1)

C. F. Gill, and *Duke*, for the defendant. The second count is bad: it charges the defendant with a different offence from that with which he was charged before the magistrates, and on which he elected to be tried by a jury. The summons charged him with an offence which, when s. 3 of the Betting House Act, 1853, is read into s. 1, is an offence punishable on summary conviction, and it is clear from the provisions of 11 & 12 Vict. c. 43, s. 10, that in summary proceedings before magistrates there is no power to state more than one offence in an information or summons. The fact that under s. 17 of the Summary Jurisdiction

(1) By 16 & 17 Vict. c. 119, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

By s. 2, betting-houses are declared to be common gaming-houses within 8 & 9 Vict. c. 109.

By s. 3: "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them . . . . shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding 100*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the non-payment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months."

Act, 1879, he elected to be tried by a jury does not affect the question; the committal must be for the same offence as that in respect of which the summons was issued, and that Act gives no jurisdiction to charge the defendant with any different offence from that for which he was committed to take his trial. The charge was one coming within the Vexatious Indictments Act, 1859, s. 1 of which expressly mentions keeping a gambling-house, and is made applicable to the present case by s. 2 of the Betting House Act, which declares that betting-houses are to be deemed to be common gaming-houses. The provisions of the Vexatious Indictments Act should, therefore, have been observed before the bill was sent up to the grand jury. Under the provisions of s. 1 of the amending Act of 1867 (30 & 31 Vict. c. 35), the consent of the Court was necessary before the additional counts were sent before the grand jury, and this consent was admittedly not asked for.

[LORD RUSSELL, C.J. It is clear that that point is not reserved, and it is doubtful whether it was so taken at the trial as to specifically direct the recorder's attention to it; it is not open to you here.]

The first count is also bad, as charging a different offence from that in the summons: it charges the defendant with keeping and using the house for the purpose of betting, which is far wider than the offence in the summons of keeping and using it for the purpose of betting on horse-races. There is in fact no count in the indictment which alleges the offence charged in the information and summons.

Secondly, the direction as to the construction to be put on the word "resorting" was wrong. An Act of Parliament, as was said by Lord Esher, M.R., in *Hornsey Local Board* v. *Monarch Investment Building Society* (1), is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed. The ordinary and natural meaning of "resorting" involves a physical resorting in the sense of "frequenting," "repairing to," or "betaking oneself to"; and there is nothing

(1) 24 Q. B. D. 1.

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in the context to make it necessary in the present case to put any other construction upon the word.

Poland, Q.C. (*J. A. Thorne*, and *Bodilly*, with him), for the prosecution. The procedure was perfectly regular, and the application to quash the indictment was rightly dismissed. The case does not fall within the Vexatious Indictments Act. The defendant was summoned before the magistrates in respect of an offence which is declared by s. 1 of the Betting House Act, 1853, to be a common nuisance, and he was liable to be indicted for a common nuisance either by keeping a house for the purpose of betting with persons resorting thereto, or by keeping a house for the purpose of receiving money as a consideration for making bets. Assuming, however, that the Vexatious Indictments Act has any application, the procedure was equally right; the defendant was summoned under the first part of the section, and as the depositions taken before the magistrates disclosed also an offence under the latter part of the section, it was perfectly proper to add a count in respect of that offence. The case is clearly within s. 1 of 30 & 31 Vict. c. 35, for there is a finding in the case that the evidence taken before the magistrates was sufficient to support all the counts of the indictment. (1)

Secondly, the conviction upon the first count is good.

[LORD RUSSELL, C.J. Upon that count the recorder left no evidence to the jury except that of written communications, and directed them that, in his opinion, that was evidence to support the count. Was that direction right?]

(1) By 30 & 31 Vict. c. 35, s. 1, the provisions of s. 1 of the Vexatious Indictments Act are not to "extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the Court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the Court in or before which the same may be preferred."

Yes; the word "resort" may have more than one meaning, and does not necessarily involve the notion of physical resorting. If physical resort is necessary, the Act could be easily evaded. A person wishing to bet might send a letter to a betting-house by a boy or a maid-servant, but the bets would not be made with them, although they alone would physically resort to the house. So, too, a man might make bets through the telephone without going near the betting-house. The meaning of "resort" in this section is "have recourse to," which would cover cases where there had been no physical resort on the part of the accused person.

Cur. adv. vult.

Nov. 17. LORD RUSSELL of KILLOWEN, C.J. In this case the defendant was charged before the magistrates with having unlawfully used a house, of which he was the occupier, for the purpose of betting upon horse-races with persons resorting thereto, which is substantially the charge in the first count of the indictment. Upon his appearance before the magistrates, he was rightly informed by them that, under s. 17 of the Summary Jurisdiction Act, 1879, having regard to the nature of the offence charged, he might elect to be tried by a jury instead of being tried summarily; he elected to be tried by a jury. The case came on for trial before the recorder and a jury, and evidence was given sufficient to establish in the opinion of the learned recorder (by which we are bound) not only that the defendant had opened, kept, or used a house for the purpose of betting with persons resorting thereto, but also that he had opened, kept, or used it for the purpose of money being received by him as the occupier upon an assurance of payment by him on the contingency of horse-races, that being the subject-matter of the first two divisions of s. 1 of the Betting House Act. The indictment upon which he was tried charged the offence in those two aspects, of keeping a house for the purpose of betting with persons resorting thereto, and of keeping it for the purpose of receiving money (to put it shortly) for ready-money betting. Before plea the objection was taken that the indictment was bad because it contained other and different charges from that upon

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which the defendant was brought before the magistrates, and in reference to which he elected to be tried by a jury; one of the questions for us is whether that contention is good. The case proceeded, and, as I have said, evidence was given which, in the opinion of the recorder, was sufficient to support a verdict on both counts. In the course of his summing-up, the learned recorder gave a direction in relation to the first count that it was not necessary to prove that persons actually and physically resorted to the house, but that it was enough to shew that, having opened the house, the defendant had received letters and telegrams there relating to betting; the second question for us is, whether that direction was right or wrong, and whether the conviction on the first count can stand. It was further contended that, in the circumstances of the case, the recorder had no power to impose more than one penalty, erroneously so-called. The word "penalty" has no application where we are dealing with an indictable offence; in such a case the Court has jurisdiction to award punishment by fine or imprisonment, as it may think fit; the word "penalty" is applicable only to the case of magistrates exercising their summary jurisdiction when the accused has not elected to be tried by a jury.

Taking these points in order, the first is that charges other than that contained in the summons were included in the indictment. I do not stop to consider whether the indictment did in fact contain such charges; I assume it, although it is clear that the charges it contained were cognate and of the same kind as that upon which the defendant was brought before the magistrates. When, indeed, the question arises, it may be a serious question whether s. 1 of the Betting House Act deals with more than one offence; but that is not a question for our determination to-day. Assuming that the indictment did include other offences, I think that that fact does not render it objectionable. The contention on behalf of the defendant seems to be based upon some confusion between those proceedings before magistrates which are essentially summary proceedings upon which the magistrates will themselves adjudicate, and cases where the magistrates are merely exercising their jurisdiction with a view to sending the case for trial before a different tribunal. It is

clear that under 11 & 12 Vict. c. 43, which relates to summary jurisdiction only, a person can only be dealt with upon the one charge which is embraced by the summons; if any further charge arises in the course of the proceedings, or any variance appears between the charge and the evidence, the magistrates can either authorize the issue of a fresh summons, or they can, by adjourning the case, give time to the accused person to meet the altered state of things. But 11 & 12 Vict. c. 42, which deals with cases with which the magistrates are not intending to deal summarily, but which they are putting in train to send elsewhere, has a set of provisions which contain some important differences; for instance, under s. 25, if the evidence is, in the opinion of the magistrates, not sufficient to put the accused party upon his trial for *any* indictable offence, he is to be discharged; if they consider it sufficient, they are to commit him for trial. The difference between the two cases is obvious: in the one, the magistrates straightway exercise their jurisdiction over the offence; in the other, the accused is sent for trial before a different tribunal, and has full and ample notice before his trial of the character of the offences with which he is charged. When a case is sent for trial, the real question to be considered is, whether the evidence on the hearing of the summons covers and justifies the counts of the indictment. It is common knowledge that application is frequently made to the tribunal to which the accused is sent for trial for leave to add to the indictment additional counts, based on the evidence contained in the depositions taken before the magistrates.

Further, were it not for s. 1 of the Vexatious Indictments Act (22 & 23 Vict. c. 17), the offence or offences for which the defendant is indicted could have been charged without any preliminary inquiry before magistrates by the mere act of preferring an indictment before the grand jury. But that section includes amongst the offences for which no indictment will lie as of right the keeping of a gambling-house; and s. 2 of the Betting House Act, 1853, declares that a house opened, kept, or used for the purposes mentioned in the 1st section, or any of them, is to be taken and deemed to be a common gaming-house within the meaning of 8 & 9 Vict. c. 109; this therefore is one

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of the class of offences within the Vexatious Indictments Act. But that Act has been followed by another (30 & 31 Vict. c. 35), s. 1 of which seems absolutely to conclude the contention on this point. The preamble to that Act recites that delay and inconvenience had frequently been caused by the provisions of the Vexatious Indictments Act in cases not within the mischief for the remedy of which it was passed, and that it was expedient to restrict their operation, and s. 1 goes on to say that those provisions are not to extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the Vexatious Indictments Act, if they were such as might then be lawfully joined with the rest of such bill of indictment, and if they were founded (in the opinion of the Court in or before which the bill of indictment was preferred) upon the facts or evidence disclosed in any examination or depositions taken before a justice of the peace, &c. It had, in fact, been found that serious questions were frequently raised whether, upon the necessary authorization being given for the presentation of an indictment, counts could be added upon charges other than those in respect of which the accused had been summoned before the magistrates, and therefore this restriction was placed on the operation of the earlier Act. It seems clear, therefore, that in the present case there was legal and regular evidence proper to go to the jury, even assuming that the counts of this indictment did contain other and different charges than that in respect of which the defendant was before the magistrates. On this point, then, I am of opinion that the defendant's first contention must fail.

We now come to the second point: that the learned recorder erroneously directed the jury in telling them that the offence charged in the first count might be established by the evidence of mere letters and telegrams sent to the house of which the defendant was the occupier, although no person had actually or physically resorted to the house in the ordinary sense of that word. On this point of the case I think that the learned recorder has somewhat misconceived the meaning of the Act. The real gist of the offence created by the section is the opening and

keeping of a house for the purpose of betting with persons resorting thereto, and the offence could be proved although no person ever resorted there. It is the purpose which is condemned, and if a person opens such a place, and issues advertisements, cards, &c., there would be ample evidence to justify a conclusion that he opened it for a purpose condemned by the statute. But this is not all. The case finds that "it was proved that he used the house for the purpose of money being received on his behalf as and for the consideration for an agreement to pay thereafter money on the event of a horse-race. There was no evidence that any person had actually gone to the house for the purpose of betting with the defendant other than those who had gone to pay money under the circumstances described in the second count of the indictment," that is, other than those who went to pay money for the purpose of ready-money betting (to put it shortly), paying the money as a stake upon a horse on the assurance that the defendant would pay over if the horse won. We are all most clearly of opinion that no stronger evidence of actual resorting to a house could be given than betting of that kind.

But then comes the question whether that evidence was left to the jury at all; and I am clearly of opinion that it was not left to them upon the first count; if we read on in the case, it is evident that as regards that count the jury were not asked to pass any judgment upon that piece of evidence. "It was objected that there was no evidence of the defendant having betted with persons resorting to the house. I directed the jury that it was not necessary for a conviction under the first count that the defendant's house should have been used for the purpose of betting with persons who physically came to the house." If the learned recorder's direction had stopped there it would have been perfectly sound, for the fact that the house was opened for the purpose of betting might have been proved in many other ways than by shewing that persons physically resorted to it. But the direction goes further, and we must assume that the jury acted on it: "But that if the house was used by the defendant as an office to which any persons who wished to bet with him were to send their communications, and if persons were in the habit

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of sending letters and telegrams to him there directing him to make bets with them, such persons resorted to the house within the meaning of the Act, and the jury might find the defendant guilty of using the house for the purpose of betting with persons resorting thereto." That direction is a direction on the first count, and it is therefore a direction that you may prove that a house is used for betting by persons resorting to it by proof merely of the fact that persons who desired to bet sent letters there; it follows therefore that, if I am right in saying that the jury were not asked to pass any judgment, as regards the first count, on any other evidence, but were invited to give their judgment on that direction, the conviction on that count must stand or fall by that direction. Is, then, the direction right? In my judgment, it is clearly wrong. The word used in the section is "resort," and we must assume that the legislature was not putting a special meaning on the word, but was using it in its ordinary, usual, and accustomed sense of "go to," "frequent," "go in and out." During the argument I put a case which illustrates the difficulty of placing on the word any other meaning than that of physical resort. Supposing that a man in Paris wanted to bet, and sent by the same post three letters to three different persons in Liverpool, Manchester, and Birmingham, instructing them to bet with him, the letters would not improbably be delivered about the same time. Could it be said that he was resorting at one and the same time to three different betting-houses, though he had never set foot in one of them? It was contended by counsel for the prosecution that to confine the meaning of the word "resort" to a physical resorting would be to place a narrow construction upon the Act; but even if that be so, we must put what we believe to be the right construction upon it. They further contended that upon this construction a case would not fall within the Act where a man did not come to the house himself, but sent messengers or representatives to make bets for him, but I should be sorry to suppose for an instant that such a case would not be within the statute as it stands, and would not be consistent with the construction I have put upon the section. And it must be borne in mind that the second part of the section, which deals with the receipt of money,

covers practically all the cases not covered by the earlier part. It must be remembered that while the law does not sanction betting, and refuses its aid to carry out any transaction founded upon a bet, it has not made all betting criminal, but only betting carried on in the manner and under the conditions specified in the statute. As to the first count, therefore, the conviction cannot stand, for the verdict was founded upon a misdirection. But as separate verdicts were returned, the conviction and fine upon the second count will stand.

The last point is that, under the circumstances, there was no power to inflict a double fine. Upon the facts, however, as we now treat them, this point does not arise, for only one punishment stands. It is unnecessary, therefore, to consider whether, for keeping a house in violation of s. 1, two penalties can be imposed for two offences committed on one day; this may raise a question proper to be argued in some future case.

I have only to add that my brother Charles, who was present during the argument, but is unable to attend to-day, concurs in my judgment.

HAWKINS, J. I entirely concur in the judgment of my Lord, and propose to add but a few words. The statute is in some respects inartistically framed. Sect. 1 makes it a common nuisance if a house is opened, kept, or used for the purpose of the occupier betting with persons resorting thereto, or receiving money as the consideration for thereafter paying money upon certain contingencies, or (to put it shortly) as the consideration for making a bet. In my opinion an indictment would be good under that section, which simply alleged that the defendant had kept and used a house within the meaning of the section so as to amount to a common nuisance, and upon a prosecution on such an indictment all the evidence could be given which could be given upon the first and second counts of the present indictment.

Looking at the allegations in the first and second counts respectively, I think that those two counts taken together make but one offence, if the acts complained of were done on the same day; they are equivalent to but one offence in law, that of keeping a house so as to be a common nuisance. I am clearly of opinion,

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so far as it is necessary to refer to the point, that two penalties could not be properly inflicted, one on the first, and the other on the second, count, it being conceded that the offences were committed on the same day; and, to avoid inconvenience in future cases, I wish to say that it seems to me irregular to join in one count two separate offences alleged to have been committed on two separate days.

Upon the first count I agree that the learned recorder's direction was wrong, and for this purpose I look at it as though that were the only count in the indictment, the direction being confined to that count. Although I was somewhat struck by the suggestion that the meaning of the word "resort" might be satisfied by "having recourse to," yet I have clearly come to the conclusion that the word is not satisfied unless there has been a physical resorting. Having regard to the common meaning of the word, if the legislature had intended to give it another meaning which would strain the ordinary meaning, it would have said so in the Act. I think, therefore, that on the ground of this misdirection there must be judgment for the defendant on the first count.

The objection to the second count was that it was bad by reason of misjoinder, because each count alleged a different offence from that upon which the defendant was summoned before the magistrates. On the face of it the indictment is perfectly good and unobjectionable, and the question is whether the count was illegally joined either because it could not in law be joined, or because the case had not been brought within the provisions of the Vexatious Indictments Act. The question must be treated as though the defendant had originally been charged with an indictable offence, and there is no doubt that the case comes within the Vexatious Indictments Act. But there are two objections to raising points founded upon this Act: first, no mention of it was made before the recorder; and secondly, even if the point had been taken, the provisions of 30 & 31 Vict. c. 35, s. 1, give ample authority to add a count if in the opinion of the Court it is founded upon the evidence disclosed in the depositions. In the present case it is found as a fact that the evidence in the depositions would have authorized

the insertion of this count, and this objection must therefore fail. I need not consider the third and fourth counts, which were found in favour of the defendant at the trial. The result, therefore, is that the conviction upon the first count must be set aside, but that upon the second count will stand, that count being unobjectionable and not open to any objection taken at the trial.

WRIGHT, J. I agree with the judgment of my Lord. I do not share the opinion of my brother Hawkins that there could not be two penalties in respect of the same day, for the offences appear to be distinct. In the one case the section aims at an occupier who makes bets at his house; in the other case it aims at his keeping an agency where money is received for bets to be made by his agency.

COLLINS, J. I agree with my Lord, and express no opinion upon the other point.

Conviction on first count quashed.
Conviction on second count affirmed.

Solicitors for prosecution: *Church, Rendell, Todd & Co., for Trehane, Plymouth.*

Solicitors for defendant: *Law & Worssam, for Rundle & Martyn, Devonport.*

W. J. B.

C. A.

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[IN THE COURT OF APPEAL.]

TAYLOR *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Practice—Costs as affected by County Court Acts—Action founded on Tort—Railway Company—Passenger—Personal Injury—Negligence of Company's Servant—Action in High Court—Damages—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action brought by a railway passenger against the company for personal injuries caused by the negligence, or misfeasance, of a servant of the company, is an action founded upon tort and not upon contract, even though the passenger has taken a ticket; and if the action is brought in the High Court and the plaintiff recovers damages to the amount of 20*l.*, he is not within s. 116 of the County Courts Act, 1888, and is therefore entitled to his full costs of the action.

Alton v. *Midland Ry. Co.* (19 C. B. (N.S.) 213) discussed.

Appeal from an order made by Wright, J., in chambers, refusing to allow the plaintiff any more costs than he would have been entitled to if the action had been brought in a county court.

By his statement of claim the plaintiff alleged that he was a traveller for a mineral-water manufacturer of Manchester; that on May 6, 1894, he was a passenger on the defendants' railway, and was entering a compartment of a train at the defendants' station at Levenshulme when a porter of the defendants negligently shut the door of the compartment upon and crushed the plaintiff's thumb; and that by the defendants' negligence the plaintiff suffered great pain, and was prevented from following his employment. At the trial the evidence shewed that the plaintiff, while getting into a railway carriage of the defendant company, had his thumb crushed by a porter shutting the door of the carriage upon it. The jury found a verdict for the plaintiff with 20*l.* damages, and judgment was entered in his favour for that amount and the costs of the action. Upon the taxation of the plaintiff's costs the question arose whether the action was to be treated as based upon the defendants' breach of contract in not conveying the plaintiff safely to his destination, or upon negligence apart from contract. If the action

was founded on contract, then the plaintiff would be entitled to costs on the county court scale only, under s. 116 of the County Courts Act, 1888 (1); if upon tort, then he would be entitled to his full costs. The master, considering himself bound by a decision of Wright, J., in chambers, upon a similar point in 1891, held that the action was founded on contract, and he, therefore, only allowed the plaintiff costs on the county court scale. The matter then came before Wright, J., who adhered to his previous decision and referred the matter to the Court of Appeal.

Nov. 3. *Morton Smith*, for the plaintiff. The plaintiff's right to recover was based, not on contract, but on tort, through the misfeasance of the defendants' servant, and that right arose independently of any contract: *Foulkes* v. *Metropolitan District Ry. Co.* (2); *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (3); *Austin* v. *Great Western Ry. Co.* (4); *Bryant* v. *Herbert* (5); Chitty on Contracts, 12th ed. p. 563.

C. A. Russell, for the defendants. This is an action founded on contract, and not on tort; for the plaintiff's case, as made by his claim, is that he was a "passenger," which implies a contractual relation between himself and the company. It was open to him to declare either in contract or in tort, at his election; but, having elected to base his action on contract, he is bound by his pleadings: *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (6).

When a man becomes a passenger by a company's railway, a

(1) Sect. 116 of the County Courts Act, 1888, enacts that, "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply: 1. If in an action founded on contract the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and 2. If in an action founded on tort the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action; and if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court."

(2) 4 C. P. D. 267; 5 C. P. D. 157, 170.

(3) 11 C. B. 655.

(4) Law Rep. 2 Q. B. 442.

(5) 3 C. P. D. 389.

(6) 4 Q. B. D. 81.

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contract is established by which the company's servant is bound to look after him; if he fails to do so, and the passenger is injured, an action by the passenger against the company must be founded on contract. A distinction has always been made by the County Courts Act between an action "founded on contract" and an action "founded on tort": see 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, s. 11; 19 & 20 Vict. c. 108, s. 30, which was the section before the Court in *Tattan* v. *Great Western Ry. Co.* (1), and 30 & 31 Vict. c. 142, s. 10. That legislation apparently intended that the distinction should be drawn, and that the Court must see whether the particular action is founded on judgment or on tort. Here the action has been, on the face of the writ, founded upon contract, and it is therefore immaterial to consider whether the plaintiff had any ground of action on tort. *Alton* v. *Midland Ry. Co.* (2) covers this case. There it was held that an action by a master against a railway company for damages for injury to his servant lay in tort and not in contract: and that case has never been overruled. The distinction between the two causes of action has always been recognised by the authorities: *Powell* v. *Layton* (3); *Tattan* v. *Great Western Ry. Co.* (4); *Boorman* v. *Brown.* (5) This, then, is a case of a passenger relying on contract, and he cannot avoid the consequence of his form of proceeding by shewing that he might have succeeded if he had sued on tort. In *Austin* v. *Great Western Ry. Co.* (6) the judgment of the Court was founded on contract, notwithstanding the approval by Blackburn, J. (at pp. 445–6), of the decision in *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (7)—that the right which a passenger has to be carried safely does not depend upon contract, but on the duty of the company to carry him safely. Accordingly, the plaintiff is entitled to costs on the county court scale only.

Morton Smith, in reply. Blackburn, J.'s, statement in *Austin's Case* (8) of the law in *Marshall's Case* (7) was cited with approval

(1) 2 E. & E. 844; 29 L. J. (Q.B.) 184.
(2) 19 C. B. (N.S.) 213.
(3) 2 B. & P. (N.R.) 365, 370.
(4) 2 E. & E. 844, 850.
(5) 3 Q. B. 511; 11 Cl. & F. 1.
(6) Law Rep. 2 Q. B. 442.
(7) 11 C. B. 655.
(8) Law Rep. 2 Q. B. 445–6.

in *Foulkes' Case* (1), where it was expressly decided that an action for injury would lie, whether there was any contract or not. This is the proper form of action by a "passenger," and follows the old form of a declaration in tort against a railway company, where the claim was always founded on contract, although it was an action in tort: Bullen and Leake (4th ed. Part I. pp. 137–142, 481–2); Chitty's Precedents in Pleading (3rd ed. vol. ii. p. 544). The cause of action, therefore, arises irrespective of any contract at all. *Alton's Case* (2) was not cited in *Foulkes' Case* (1) either in the Court of Appeal or in the Court below: it stands alone, and cannot be supported.

Cur. adv. vult.

1894. Nov. 9. LINDLEY, L.J. This is an action brought in the High Court by the plaintiff, who was a passenger by the defendant company's railway, and the action was brought to recover damages for an injury, that injury having been sustained by the negligence of the defendants' servant in slamming the door and jamming the plaintiff's hand. The plaintiff recovered a verdict for 20*l.*; and now comes the question whether he is entitled to his full costs or not. That depends upon s. 116 of the County Courts Act, 1888. [The Lord Justice read it, and continued:—]

Now, if this action falls within the first clause—that is to say, if it ought to be regarded as an action founded on contract, then the plaintiff can only recover county court costs. If, on the other hand, the action falls within the second clause—that is to say, if it is an action founded on tort, then there would be nothing to qualify the plaintiff's right; he would get his full costs. We are driven, therefore, to consider whether, adopting the language of this Act, this action brought by the plaintiff is an action founded on contract or an action founded on tort. The language of the Act is a little peculiar. I need not go into the history of it; I merely observe that the classification which is made by the legislature is confined to actions brought in the High Court which might have been commenced in the county court, and those two

(1) 4 C. P. D. 267, 277–8; 5 C. P. D. 157, 169, 170.
(2) 19 C. B. (N.S.) 213.

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sub-divisions exhaust the whole of that class of actions, and each sub-division excludes the other. That gives rise to the difficulty here. We no longer have to consider forms of actions, but we are compelled by the legislature to put every action which can be brought in the county court, but is brought in the High Court, into one or the other of those two categories. Every one who has studied the English law will know perfectly well that there is debateable ground between torts and contracts. There are what are called quasi-contracts and quasi-torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often a cause of action may be treated either as a breach of contract or as a tort. But here we are compelled to draw the line hard and fast and put every one of the actions into one class or the other. I have looked into the authorities, but it is only necessary to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think anything would be gained now by going into the old learning about the forms of actions. We have to consider this Act of Parliament, and the only cases which are of any importance and assistance as enabling us to construe the Act are those cases which have been decided upon it or upon the similar Acts which this Act has replaced.

First and foremost, there is the case of *Pontifex* v. *Midland Ry. Co.* (1), decided in 1877; secondly, there is the case of *Bryant* v. *Herbert* (2), decided in 1878; and then later, in the same year, there was the case of *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) Having studied those cases with care (I do not think it necessary to go into them), it appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to

(1) 3 Q. B. D. 23. (2) 3 C. P. D. 389.
(3) 4 Q. B. D. 81.

prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible, without running contrary to the reasoning of the Court of Appeal in the case of *Bryant* v. *Herbert* (1), which reversed the decision of Denman, J., and myself in the same case, to hold that, within the meaning of the County Courts Act, this is an action founded on contract as distinguished from tort.

The case to which Mr. Russell referred of *Alton* v. *Midland Ry. Co.* (2) at first appears to present some difficulty; but, in the first place, that case was not like this, and, in the next place, it has been criticized and commented upon somewhat adversely; I do not say it has been overruled. But it is not a case on the construction of this Act of Parliament, and I prefer to base my decision on what I consider to be the true construction of the Act of Parliament in this case.

Accordingly, I come to the conclusion that this appeal ought to be allowed, and the plaintiff will have his costs here and below.

A. L. SMITH, L.J. The question is whether, when a passenger contracts with a railway company—that is, takes a ticket—entitling him to be carried upon a given journey, and he is injured thereon by a misfeasance for which the company is liable, and he brings an action therefor in the High Court of Justice, such action is founded upon contract, or founded upon tort within the meaning of s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43); for by that section different consequences arise as to costs if the action is founded upon contract, or if it is founded upon tort.

It has been held by this Court that, in considering a matter of costs under sections similar to the present, the substance of the action, and not its form, is to be looked at, and it should be ascertained whether the real substantial complaint is for breach of contract or for a tort: see *Bryant* v. *Herbert* in the Court of Appeal. (1) It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in

(1) 3 C. P. D. 389. (2) 19 C. B. (N.S.) 213.

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either contract or tort; but this is not the governing consideration. It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not: *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (1), *Austin* v. *Great Western Ry. Co.* (2), and *Foulkes* v. *Metropolitan District Ry. Co.* (3); and he need not allege or prove any contract at all; he need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants, for this is sufficient to shew a breach of that duty on the part of the defendants which is implied by law.

It is equally clear that in such an action, whether the plaintiff sets up a contract or not, he must, in order to succeed, prove active negligence—that is, a misfeasance of the company's servants—and that, if he fails in the proof of this negligence, he will undoubtedly fail in the action. The fact that the plaintiff happens to have a contract, that is to say, a ticket, is of use in such an action, it is true, for the purpose of shewing that the plaintiff was lawfully where he was when he sustained the injury; but proof of the fact can be given aliunde, and proof of a contract is by no means vital to success. Bramwell, L.J., in *Bryant* v. *Herbert* (4), says—and in this I agree—that the foundation of an action are those facts which it is necessary to state and prove in order to maintain it, and no others. On the other hand, if the action be brought against a common carrier for non-delivery of goods, this is founded upon contract, as was held by the Court in *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (5), and negligence need not be averred and proved; so also if brought for a non-feasance, for then the plaintiff cannot succeed without proof of a contract and its breach. The case of *Alton* v. *Midland Ry. Co.* (6), so much relied upon by the respondents, was decided upon demurrer to a declaration in which it was expressly averred that the right of the servant for whose injuries the master was therein suing the company, was

(1) 11 C. B. 655.
(2) Law Rep. 2 Q. B. 442.
(3) 5 C. P. D. 157.
(4) 3 C. P. D. 389
(5) 4 Q. B. D. 81.
(6) 19 C. B. (N.S.) 213.

founded upon contract, and this was taken as the premiss upon which the case had to be decided; and it was there held that the master could not sue for injury to his servant caused by breach of a contract entered into between the servant and the company. No question was or could be raised as to what would have been the result if the servant's remedy against the company had been founded upon tort, for the case was, as I have already stated, decided upon demurrer to a declaration which expressly averred that the servant's rights against the company were founded upon contract. That case, when looked into, is not the authority which it was supposed to be, and in no way decides that an action brought for personal injury against a company by a passenger who has taken a ticket is necessarily an action founded upon contract and not upon tort. The judgments of Bramwell and Brett, L.JJ., in the before-mentioned case of *Bryant* v. *Herbert* (1), are very pertinent to this case; and having considered them and the other cases cited therein, and especially *Pontifex* v. *Midland Ry. Co.* (2), and for the reasons I have stated, I hold that an action against a railway company for personal injuries by reason of the active neglect of the company's servants, even though such person has taken a ticket, is an action founded upon tort, and not upon contract, within the 116th section of the County Courts Act.

I may add that, having consulted the Senior Master of the Common Law Division, I find that this decision is in accord with the mode of taxation hitherto adopted in that Division.

For the reasons above stated, this application of the defendant company, referred as it has been by Wright, J., from chambers, must be refused with costs here and at chambers.

Appeal allowed.

Solicitors: *Indermaur & Brown, for Gardner & Son, Manchester; Cunliffes & Davenport.*

(1) 3 C. P. D. 389.

(2) 3 Q. B. D. 23.

G. I. F. C.

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Nov. 26, 27.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* CARTWRIGHT AND OTHERS.

Practice—Service out of Jurisdiction—Defendant resident in Scotland—Person out of Jurisdiction a Proper Party to Action—Action of Tort—Discretion—"Comparative Cost and Convenience" of Proceeding within Jurisdiction—Order XI., *rr.* 1 (*g*), 2.

Order XI., r. 1 (*g*), by which "service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever . . . any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction" applies to actions of tort, but the jurisdiction so given is discretionary.

Where an action of deceit was brought against three defendants jointly, two of whom were resident in England and one in Scotland:—

Held (by Lopes, L.J., and Rigby, L.J., Lord Esher, M.R., dissenting), that, as under the circumstances of the case "comparative cost and convenience" were in favour of proceeding against the last-mentioned defendant in England in the same action with the other defendants, not in Scotland where he resided, service of the writ upon him out of the jurisdiction ought to be allowed.

"Comparative cost and convenience" in Order XI., r. 2, means, not the comparative cost and convenience to the person sought to be served only, but to the parties generally.

APPEAL from an order of Wright, J., at chambers, setting aside an order for service of a writ out of the jurisdiction and the service effected under such order.

The action was brought against three persons, of whom two were directors of the Equitable Mortgage Company of New York and the other was its manager in London, the indorsement on the writ claiming damages against the defendants by reason of their having induced the plaintiff to purchase shares in the company by issuing and sending to him in London a false, fraudulent, and misleading prospectus and report of the assets, liabilities, and business of the said company. The amount claimed by the plaintiff was 125*l.* Two of the defendants resided in England; but one of them, named Guild, was a domiciled Scotchman, who resided in Edinburgh. An order had been obtained for the service of a concurrent writ upon him in Scotland, and the writ had been served accordingly. An application on his behalf was

made at chambers to set aside the order and the service under it, when Wright, J., came to the conclusion that it was not a proper case for allowing service out of the jurisdiction, and granted the application. The learned judge, however, expressed considerable doubt on the matter, and said that the case was one which ought to be brought before the Court of Appeal. He accordingly gave leave to appeal, with liberty to the parties to file any further affidavits they might think fit.

It appeared that the company above mentioned was an American company, which had an office in London for the transaction of its English business, and that it was now in the course of compulsory liquidation and reconstruction. The plaintiff's affidavits stated that the prospectus complained of was printed and issued in London, the defendant Guild having on many occasions come to London on business connected with its issue; that the books and documents relating to the company were in London in the possession of receivers appointed on behalf of the debenture-holders; that the only witnesses in the United Kingdom whose evidence would be material, with the exception of the defendant Guild himself, resided in or near London; and that a commission would be necessary to take evidence in America for the purposes of the action; and if the plaintiff's case against the defendant Guild had to be prosecuted in Scotland it would be necessary to have a separate commission for the purposes of that action.

It appeared from an affidavit made by the defendant that certain material books and documents were in America, and he stated that if the case proceeded it would be necessary for him to call witnesses resident in Scotland, and that there were in Scotland letter books and documents which would require to be produced.

McCall, Q.C., and *Whitehouse*, for the plaintiff. The defendant Guild is a proper party to the action, and therefore he may be served out of the jurisdiction under Order XI., r. 1 (*g*). It has been held that that clause of the rule is applicable in cases of tort: *Croft* v. *King*. (1) No doubt there is a concurrent

(1) [1893] 1 Q. B. 419.

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remedy in Scotland against Guild; but by Order XI., r. 2, in such cases the "comparative cost and convenience" of proceeding in England or in the place of residence of the defendant sought to be served is to be considered—by which is meant the comparative cost and convenience, not of the defendant to be served only, but of the parties generally. In this case the balance of convenience clearly is in favour of the whole matter being disposed of by one action in this country. [They also cited *Massey* v. *Heynes* (1); *Witted* v. *Galbraith* (2); *The Elton.* (3)]

Sir R. E. Webster, Q.C., and *Theobald*, for the defendant Guild. It is not contended that the words of Order XI., r. 1 (*g*), are not wide enough to give jurisdiction to allow service out of the jurisdiction under it in cases of tort, but it is clear that the jurisdiction so given is discretionary, and, without saying that it should never be exercised in cases of tort, it is submitted that a case of alleged fraud such as this is not a proper case for allowing a party out of the jurisdiction to be served under the rule. In some cases, where the tort complained of is in its nature really a joint act of several defendants, it may be proper that the matter should be investigated as against all of them in the same action. But this action is not of that character. It is not shewn that there was here any such joint act. In an action of deceit the gist of the action is the fraudulent intention in each particular defendant's mind, and the circumstances in relation to each defendant as regards motive and knowledge of the facts and his connection with the prospectus may be different. It is not enough to shew that the defendant sought to be served out of the jurisdiction might have been properly joined in the action if he had been within the jurisdiction. In the cases relied on by the plaintiff there was a great deal more than that, the real ground of decision being that there was a single transaction which the convenience of the case obviously required to be investigated as against both defendants on the same occasion. Cases of contract, where the foreign principal is made defendant as well as his agent within the jurisdiction, such as *Massey* v. *Heynes* (1), differ entirely from the present, for there it is a

(1) 21 Q. B. D. 330. (2) [1893] 1 Q. B. 431, 577.
(3) [1891] P. 265.

question of one transaction, the liability in respect of which, whether of the principal or agent, it is obviously convenient to determine in the one action. In *Croft* v. *King* (1) the only question raised was whether there was jurisdiction under Order XI., r. 1 (*g*), in cases of tort: the question whether as a matter of discretion the order ought to have been made does not appear to have been discussed. Even if it had been, that case is not binding on this Court. The defendant Guild is clearly not a necessary party to this action. The other defendants can be sued here without him, and there is a concurrent remedy against him in Scotland, where he could be conveniently and inexpensively sued in the Sheriffs' Court, the sum claimed not being large. The "comparative cost and convenience" is in favour of not proceeding against him in the action in this country, but in Scotland where he resides; and by Order XI., r. 2, where that is the case, the service out of the jurisdiction ought not to be allowed.

McCall, Q.C., in reply.

LORD ESHER, M.R. The question how far the jurisdiction given by Order XI., r. 1 (*g*), is applicable in cases of tort appears to me a somewhat nice one. I should be very much inclined, if I had to decide the point, to say that it was not properly applicable to actions for fraud. If a defendant resident out of the jurisdiction is sued alone in such an action of tort it is clear that Order XI. cannot be applied, and the Court would have no jurisdiction to allow him to be served under that order. It seems somewhat anomalous to me, I must confess, that, though he could not be served out of the jurisdiction if sued alone, he can be so served by reason of the plaintiff's suing somebody in England and alleging that he is a proper party to the action. But the words in the sub-section of the rule are large enough to include actions of tort, and I do not feel at liberty to say that it may not be applicable in some cases of joint torts. I cannot help thinking, however, that, though it may be applicable to some cases of tort, it ought only be so applied in extreme cases. I do not think it necessary for me to deal with the provisions of

(1) [1893] 1 Q. B. 419.

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rule 2 of Order XI. for the purposes of this case. If the defendant, whom it is sought to serve out of the jurisdiction, were not resident in Scotland, but out of the jurisdiction in some country other than Scotland or Ireland, I should be loath to apply rule 1 (*g*) in an action of this kind, unless a very strong case were made out for so doing. It is clear that the provisions of the rule are discretionary, not imperative, and I can see no special reason in this case for applying its provisions. The action appears to me to be one of a very ordinary kind, and to involve no circumstances that are not common to most of such actions. Dealing with the case quite independently of rule 2, so far as I can see, the way in which the judge exercised his discretion was correct; at any rate, I am not prepared to say that it was wrong; and the rule is that, where a judge has exercised a discretion, the Court ought not to interfere, unless they clearly see that he was wrong. I decide the case on rule 1; but it may be observed that rule 2 is a rule for the further protection of persons resident in Scotland or Ireland, not in favour of the plaintiff desiring to serve the writ there, and, if service ought not to be allowed having regard to rule 1 only, the case would be still stronger where rule 2 applies. I think this appeal should be dismissed.

LOPES, L.J. I agree that the discretion of the judge ought not to be lightly interfered with; but there are exceptional features in the present case. The learned judge seems to have expressed great doubt, and desired that the case should be brought before the Court of Appeal. Furthermore, he gave leave to bring fresh facts forward on affidavit; and fresh facts have, as I understand, been so brought before us. What is the nature of this action? It is an action of deceit brought against three defendants, of whom two are resident within, and one is resident without, the jurisdiction. The plaintiff's complaint in the action is made against the defendants jointly, and it is clear that in the case of a tort committed by several persons jointly they are jointly as well as severally liable. The matter with which we are dealing depends upon Order XI., r. 1 (*g*). That rule provides that service out of the jurisdiction may be allowed whenever

"any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The first question that arises is whether Guild is a proper party to the action. The true test of that appears to me to be whether, if he had been within the jurisdiction, he would have been a proper party to the action. Nobody can deny that, if he had been within the jurisdiction, he would have been properly sued with the two other defendants. Some question has been raised as to whether the provision of Order XI., r. 1 (*g*), applies to actions of tort. That matter came before the Court in *Croft* v. *King* (1), and it was held that it did so apply. Certainly the words of the rule are large enough to include actions of tort. It appears to me, and indeed it is not disputed, that there is jurisdiction under the rule, and that it applies to actions of tort. But the provisions of rule 4 of Order XI. shew that the judge has a most ample discretion with regard to giving leave for service out of the jurisdiction. I quite agree that there may be some actions of tort in which it would be right that he should exercise that discretion in one way, and others in which it would be right that he should exercise it in the other way. The question is in which way the discretion ought to be exercised in the present case. That question depends mainly in my view on the provisions of rule 2 of the order, which provides that, where leave is asked to serve a writ in Scotland or in Ireland, if it shall appear that there may be a concurrent remedy in Scotland or Ireland, the Court or judge shall have regard to "the comparative cost and convenience of proceeding in England or in the place of residence of the person sought to be served." Therefore, the judge having a discretion, one of the elements for determining the question how it is to be exercised, is such comparative cost and convenience. How, then, does the present case stand in that respect? I think a strong case is made out in favour of trying the action in England as against the defendant Guild. In my view, it is not the cost or convenience of the defendant only whom it is sought to serve out of the jurisdiction which is referred to by the rule, but the general cost and convenience of

(1) [1893] 1 Q. B. 419.

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all parties to the action. In this case the books of the company are in England; the material witnesses, or at any rate most of them, are in England; the prospectus complained of was issued in England. Then, again, it appears that it will be necessary to have a commission to examine witnesses in America; and, if there were separate actions against the defendants, one in England and the other in Scotland, it would be necessary to have two commissions, which would materially increase the expense. Having regard to all these matters, I think that comparative convenience is strongly in favour of allowing the three defendants to be sued in one action in this country. For these reasons I am unable to agree with the Master of the Rolls, and I think that service out of the jurisdiction ought to be allowed in this case. It appears to me that the appeal should be allowed.

RIGBY, L.J. This is an appeal to the discretion of the Court against the decision at which the learned judge at chambers, in the exercise of his discretion, arrived. I quite agree with what has been said as to the importance of not exercising our discretion adversely to the decision of the judge in such a case, except upon a very clear state of facts. But I think it very material to observe that in the present case the whole of the facts as laid before us do not appear to have been brought before the learned judge, and that he himself seems to have gathered that there might be other material facts, and expressly gave leave to file further affidavits, stating that the case was eminently a matter for the Court of Appeal. In reference to the construction of rule 1 (*g*) of Order XI., there is no doubt that this defendant, if sued alone, could not have been served in Scotland; but rule 1 (*g*) can have no other meaning than this: viz., that, though a person cannot be served out of the jurisdiction if sued alone in this country, yet there are cases in which, if the action is properly brought in England against other defendants, it is right that he should be included in the same action with them. To my mind the only question under rule 1 (*g*) is whether, if this defendant had been resident in England, it would have been proper to join him with the other defendants in England. It is admitted —and I think rightly—that we have jurisdiction to allow this

defendant to be served out of the jurisdiction. Therefore, the question comes to be one of discretion turning upon the comparative convenience of proceeding against the defendant in England or in Scotland where he resides. In dealing with this question all the circumstances of the case must be taken into account, and among others, no doubt, the place of residence of the defendant to be served out of the jurisdiction. If the defendant lived on the other side of the globe it might be another matter; but here he lives very little further away than if he resided in the extreme north of England. The question really is whether, on the statements made in these affidavits, it appears to be more convenient that the action as against the Scotch defendant should be tried in London or in Edinburgh. I agree that, before making the order, we ought to see very plainly that comparative convenience is in favour of trying the action as against him in London. Rule 2 of Order XI. contains special provisions with regard to residents in Scotland and Ireland. It is provided that, "if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland, the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant or person sought to be served"—which means, I think, the general convenience of all the parties to the action, although the convenience of the defendant may, no doubt, be deserving of special consideration—"and particularly in cases of small demands to the powers and jurisdiction of" certain Courts existing in Scotland and Ireland where such demands may conveniently be prosecuted. There are several circumstances in this case which lead me to the conclusion that comparative convenience is in favour of the plaintiff's being allowed to proceed against the defendant Guild in this country. First, there is the fact that the defendant has been coming to London and transacting there the very business in respect of which the complaint in the action arises. In compliance with rule 4 of Order XI., the plaintiff has made a detailed statement of the sort of case which he will seek to prove; and it appears that the prospectus complained of, the general purport of which he has stated, was issued by these defendants in London. Then again, it appears

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Rigby, L.J.

that there will have to be a commission to America for the purpose of taking evidence there. It would be a strong thing to say that it would be practically convenient that there should be two commissions, one for the purposes of the action against the defendants in England, and the other for the purposes of that against the defendant in Scotland. Furthermore, it appears that at any rate the main body of the witnesses who are in the United Kingdom are resident in or near to London. The defendant only meets the detailed statements of the plaintiff's affidavit to that effect by a very general statement that he wishes to call witnesses who reside in Scotland. It also appears that such of the material documents as are not in America are in London, with the exception of certain letter-books which are in Scotland, but which could be produced in London at a trifling expense. The conclusion at which I arrive upon the terms of rules 1 and 2 of Order XI., and giving full effect to those of the latter rule, is that the defendant whom it is sought to serve out of the jurisdiction would be a proper party to the action if he were within the jurisdiction, and therefore the case comes within rule 1 (*g*) of Order XI.; and that the case is an exceptional one, in which the plaintiff has satisfactorily made out that the defendant ought to be sued within the jurisdiction and not in Scotland, where he is resident. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *W. M. Willcocks.*

Solicitors for defendant: *Thorne & Welsford.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1894
Nov. 9.

IN RE NORDENFELT. EX PARTE MAXIM-NORDENFELT GUNS AND AMMUNITION COMPANY.

Bankruptcy—Bankruptcy Petition—Receiving Order—Debtor not domiciled in England—"Dwelling-house in England"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).

By the Bankruptcy Act, 1883, s. 6, sub-s. 1, a creditor is not entitled to present a bankruptcy petition against a debtor, unless (inter alia) "the debtor, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England":—

Held, that a debtor, who had resided in a house of his own in England, but who had gone to reside abroad, and abandoned the house as his residence more than a year before the presentation of a petition against him, and had not again adopted it as his residence, though he might at any time during the year, had he chosen to do so, have gone to reside in it, could not be considered to have had a "dwelling-house" in England within the period prescribed by the section.

APPEAL by the Maxim-Nordenfelt Guns and Ammunition Company against the refusal of one of the registrars in bankruptcy to make a receiving order against T. Nordenfelt.

The bankruptcy petition was presented by the company in respect of the amount of costs which Nordenfelt had been ordered by a judgment of the Court of Appeal to pay to the company. Nordenfelt had committed an act of bankruptcy by his failure to comply with a bankruptcy notice which the company had served upon him in respect of the debt. He was not domiciled in England, nor had he, within a year before the presentation of the petition, ordinarily resided in England. But the petition alleged that he had within that year had a dwelling-house in England.

The debtor denied this allegation.

The petition was presented on November 9, 1893. The evidence shewed that the debtor had resided at Beckenham, in Kent, in a house called Downs House, the lease of which he had purchased. He had mortgaged the lease. He left that house on November 30, 1891, and went, with his wife and servants, to

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live in Paris. He had no children. The house and furniture were left in the charge of a caretaker, and the debtor instructed a house-agent to let the house furnished or unfurnished. A board was put up announcing that the house was to be let. In May, 1892, the house not having been let, the furniture was offered for sale by auction, and a large part of it was then sold and taken away by the purchasers. The remainder (said by the debtor to be of the value of 500*l.*) was not sold, and was left in the house, but it was packed up ready for removal. In December, 1892, the debtor sold the lease of the house.

Since November 30, 1891, the debtor had resided in Paris, and had never occupied Downs House, though he could have done so, if he had chosen, at any time previous to the sale of the lease, as the house was unoccupied except by the caretaker. During that period the debtor had paid occasional visits to England with reference to a litigation between himself and the company. On November 16, 1892, he made two affidavits, in an action which he had brought in the Queen's Bench Division against a Mr. Ristori. One of these affidavits was made upon an application for judgment under Order XIV., and in it the debtor described himself as of "Downs House, Beckenham." The other affidavit was made in opposition to an application by Ristori for security for the costs of the action, on the ground that the plaintiff was resident abroad. In this affidavit the debtor stated that he was the assignee by purchase of the lease of Downs House, Beckenham; that there was in that house belonging to him the whole of the necessary furniture and effects for residence there, of the value of upwards of 500*l.*; that when he was in Paris he resided in furnished apartments; and that he could reside in his house at Beckenham whenever he was so disposed.

The registrar refused to make a receiving order and dismissed the petition, on the ground that the debtor had not within the year had a dwelling-house in England. He was of opinion that the debtor had left Downs House under circumstances which shewed an intention of never coming back to reside there—that he had left the house for good—and the house had therefore

ceased to be his dwelling-house within the meaning of s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883.

The company appealed.

Jelf, Q.C., and *F. Cooper Willis*, for the company. It is submitted that upon the true construction of s. 6, sub-s. 1 (*d*) (1), of the Bankruptcy Act, 1883, the debtor, within a year before November 9, 1893, the day on which the petition was presented, had had a "dwelling-house" in England. The section draws a distinction between being "ordinarily resident," and "having a dwelling-house" in England. It is sufficient if the debtor has had within the year a "potential" dwelling-house in England—a house which belongs to him and has previously been his dwelling-house, and into which he can go and reside at any moment if he pleases: *In re Hecquard.* (2) In the affidavits which the debtor made in the action against Ristori he himself treated Downs House as his dwelling-house, and he is not entitled now to say that it was not. The petitioning creditors are not bound, as the registrar thought, to prove that the debtor had an animus revertendi. The question cannot turn upon the state of the debtor's mind.

Herbert Reed, Q.C., and *Wace*, for the debtor, were not called upon.

LORD ESHER, M.R. I will not attempt to give an exhaustive definition, or indeed any definition, of the term "dwelling-house" as used in this section. I only intend to say what I think is not a "dwelling-house." If a man has a house belonging to him, but he has abandoned it as his dwelling-house, that house is not his "dwelling-house" within the meaning of this section. The registrar had to say upon the evidence before him whether the debtor had in fact abandoned Downs House as his dwelling-house for more than a year before the filing of the petition. He came to the conclusion that the debtor

(1) Sect. 6: "(1.) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

(2) 24 Q. B. D. 71.

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had done this, and I can see no reason for differing from his conclusion.

LOPES, L.J. I agree. If I had been in the registrar's place I should have come to the same conclusion as he did upon the evidence.

RIGBY, L.J. I am of the same opinion. The debtor had, no doubt, had a dwelling-house at Beckenham, and he might very easily after he went away to Paris have adopted the house again as his dwelling-house. But when it appears, as it does, that he offered all his furniture in the house for sale, and had that which was not sold packed up in such a way that it could not, without some trouble and expenditure, be placed in a position to be used, I am satisfied that he had abandoned the house as his dwelling-house before the commencement of the critical year. I am satisfied also that he did nothing during the year to adopt it again as his dwelling-house.

Appeal dismissed.

Solicitors: *Wilson, Bristows, & Carpmael; Munns & Longden.*

W. L. C.

THE QUEEN *v.* THE REVISING BARRISTER OF THE BOROUGH OF LIVERPOOL AND CHADWICK.

1894
Nov. 5.

Parliament—Franchise—Borough Vote—Duplicate Entries—Elector's Notice of Selection—Validity of Notice—Appeal from Revising Barrister—Parliamentary Registration Act, 1843 (6 & 7 *Vict. c.* 18), *ss.* 17, 18, 39, 42—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 14—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 5, *and Sched.* 3, *Form* (*P*)—*Registration Order*, 1889, *Sched.* 3, *Form* (*P*).

No appeal lies from a decision of a revising barrister upon the validity of a notice given by an elector, under the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 14, in the case of duplicate entries of his name upon the list of voters for a borough, selecting the entry to be retained for voting.

RULE NISI for a writ of mandamus calling upon the revising barrister for the parliamentary and municipal borough of Liverpool and one Charles Chadwick to shew cause why an appeal should not be entertained and a case stated in the matter of an objection taken to the name of Charles Chadwick being expunged from or starred on the list of electors for the Kirkdale parliamentary division of the borough.

The name of Charles Chadwick was inserted in the list of parliamentary electors for the Kirkdale parliamentary division of the borough of Liverpool in respect of the successive occupation of 38, Walton Road, in the township of Kirkdale, which was his place of abode at the end of the qualifying year, and of another house in the borough.

His name was also inserted in the list of parliamentary electors for the Abercromby parliamentary division of the borough in respect of his place of business at 6, Temple Lane in that division.

At the opening of the first court for the revision of the list of electors for the borough of Liverpool there was handed to the revising barrister on behalf of Charles Chadwick the following notice, which was signed by him: "To the revising barristers of the parliamentary borough of Liverpool. I, the undersigned, being on the list of voters for two or more divisions of the parliamentary borough of Liverpool, do hereby select the following, viz.: for parliamentary voting, Abercrombie Parliamentary

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Division No. 7. Polling District No. 29, No. on list 1724. (Signed) Charles Chadwick. Place of abode 38, Walton Road. Polling District No. 3, No. on list 1906."

An objection was made on behalf of a person whose name was on the list of voters for the borough to the name of Charles Chadwick being marked on the list of electors for the Kirkdale division in accordance with the notice given on the grounds that he had not made a selection in accordance with Form (P) of the Registration Order, 1889, and that the notice delivered to the revising barrister disregarded the form and substance of Form (P) in important essentials. (1)

The revising barrister held that the form handed to him complied with Form (P), and duly marked for other purposes only the name of the voter in the Kirkdale division, and retained the entry in the Abercromby division for parliamentary voting.

There are nine parliamentary divisions within the parliamentary borough of Liverpool, which comprises six parishes or townships, or portions thereof.

(1) The Registration Order, 1889, made in pursuance of the powers of the Local Government Act, 1888, s. 76, sub-s. 7, contains in Sched. 3 the following form:—

"Form (P.).

"Form of elector's notice of selection in the case of duplicate entries.

"To the revising barrister for the parliamentary borough of ———.

"I hereby elect to vote in respect of the following entry in [division ——— of] the ——— list of parliamentary electors [*or* burgesses *or* county electors] for the parish [*or* township] of ———.

Name of Elector in full, surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.

"(Signed) A. B.

"NOTE.—The foregoing form should be filled up with a copy of the entry in the list of electors which the elector wishes to have retained for voting.

"The notice should specify the list, and, if the list is made out in divisions, the division in which the entry referred to appears."

The lists of voters for each of the divisions are divided into the occupiers' lists, the lodgers' lists, and the freemen's lists, and the occupiers' lists are made out in divisions, namely, division one, division two, and division three.

The objector duly gave to the revising barrister on the same day on which the decision was pronounced a notice in writing that he was desirous to appeal; but the revising barrister refused to state a case for the opinion of the Court.

The objector thereupon obtained a rule nisi for a writ of mandamus, calling upon the revising barrister and the voter to shew cause why a case should not be stated and the appeal entertained.

Sir H. James, Q.C., and *W. F. Taylor*, for the defendant Chadwick, shewed cause against the rule. No appeal lies against the decision of the revising barrister with respect to the sufficiency of the notice. Where the name of a voter is entered more than once as a parliamentary voter on the lists of voters for the same parliamentary borough, the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 14, gives to the voter the right to select one of the entries to be retained for parliamentary voting. If the voter does not make a selection, then by the Registration Act, 1885 (48 & 49 Vict. c. 15), s. 5, sub-s. 1 (*b*), as between the place of abode of a voter and his place of business, the entry in respect of the place of abode is to be retained. If the voter desires to exercise his right of selection, he must do so by giving a notice in writing to the revising barrister at the opening of his first revision court. The Registration Act, 1885, Schedule 3, Form (P), prescribes a form—perpetuated by the Registration Order, 1889, Schedule 3, Form (P)—of voter's notice of selection in case of duplicate entries. The notice given by the voter in this case was substantially, although not verbally, in the form prescribed, giving more information, and giving it in a more convenient form for reference to the lists, and the revising barrister has held it to be sufficient. From that decision there is no appeal. The right to appeal from a decision of a revising barrister, which is a limited statutory right, is given by the 42nd section

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of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), and the objector in this case is not a person who "under the provisions hereinbefore contained shall have . . . made any objection to any other person as not entitled to have his name inserted in any list" within the meaning of that section. The provisions referred to are (s. 17), that notices of objection must be given in writing some time before the lists are revised to the overseers, to the voter, and (s. 18) to the public, and none of these conditions have been complied with here. The 39th section does, indeed, give a right to object at the revision court without previous notice to the insertion of the name of a voter which has been omitted from the lists. That, however, is not the case here. In the present case, the voter's name, so far from being omitted, was on the lists in respect of two qualifications, and, no notice of objection having been given, he had an absolute statutory right to have it retained, and to select one of the entries for parliamentary voting. There is, therefore, no appeal from the decision of the revising barrister in this case: see *Arnold* v. *Clerk of the Peace for Kesteven.* (1) The question of the sufficiency of the notice lay entirely between the revising barrister and the voter, and no other person had a right to see the notice or to intervene in any way.

Joseph Walton, Q.C., and *W. H. Butler*, for the objector, in support of the rule. The Act of 1843 must be read together with the later Acts which are incorporated with it. If the Act be so read, the objection taken in the present case is an objection to a person as not entitled to have his name inserted in a list. If the lists had remained as they were, and the revising barrister had not observed that the voter's name was entered in respect of more than one qualification, and so had not marked either of the entries, then by the Registration Act, 1885, s. 5, sub-s. 2, the voter would have been entitled to vote only in that division in which he was registered in respect of his place of abode, and not in respect of any other entry. Consequently, the act of the revising barrister in marking the voter's name in the Kirkdale division was equivalent to inserting it in the Abercromby division, in which the voter would otherwise have had no right

(1) 65 L. T. 618.

to vote. Although the voter was in one sense on the list of the Abercromby division before the entry in the Kirkdale division was marked, he was not on the list as a person entitled to vote. Until the notice of selection was given, the entry of the voter's name in the Abercromby division was not a full entry, and the action of the revising barrister amounted to an effective insertion of the name on the list. The notice of selection, therefore, is equivalent to a claim by a voter to have his name inserted in a list as an effective voter, and the Act of 1843 gives any voter on the lists a right to object to it, and a right to appeal from a decision of the revising barrister on any point of law material to the objection. In *Arnold* v. *Clerk of the Peace for Kesteven* (1) the division was a county division, in which different considerations arise, and the case is not in point.

MATHEW, J. This is a case of great importance, because the object of the application is to limit the right of a voter to elect for which of two or more qualifications he will choose to vote. I am clearly of opinion that no such right of appeal as that contended for by the applicant is given by the 42nd section of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18). That section provides for appeals from revising barristers. The terms of the section are: "That it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case," to appeal in the manner specified by the section. What are the "provisions hereinbefore contained"? So far as the making of objections is concerned we find them in the 17th and 18th, and also in the 39th, sections of the Act. The 17th section provides that every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the last day of July next preceding to

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Mathew, J.

have his name inserted in any list of voters for the same city or borough; and every person so objecting shall give or cause to be given a notice to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; and every person so objecting shall also give or cause to be left at the place of abode of the person objected to a notice; and every notice of objection shall be signed by the person objecting. Then the 18th section provides that the overseers shall include the names of all persons so objected to in a list, and shall sign the list and cause copies thereof to be written or printed, and shall publish the list of persons objected to. Further, the 39th section permits a voter to oppose the claim of a person who has been omitted from the list to have his name inserted in it. These are the provisions referred to in the 42nd section so far as objections are concerned, and there is nothing in the section to give an appeal from a decision of a revising barrister upon a point of law in the case of any objection made otherwise than under those provisions.

It was said, however, that subsequent legislation has imposed upon this Court the obligation of hearing appeals in a number of other cases. The first statute referred to is the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 14 of which gives a voter whose name appears more than once on the lists the right to select the entry to be retained for voting. That section applies to the present case; but I can see nothing in it as to any appeal from any determination of the revising barrister.

It was also said that in some way under the 5th section of the Registration Act, 1885, a right of appeal arose; but I am unable to see anything in the section as to appeals, and in my judgment the section has no application here.

The circumstances of this case are that an objection was made before the revising barrister to the right of a voter to select the entry of his name in respect of his place of business to be retained for voting instead of the entry in respect of his place of abode. The voter delivered a notice to the revising barrister, and the revising barrister considered the notice and, in my judgment rightly, acted upon it and allowed the voter the right to elect.

It is said upon the other hand that the revising barrister ought not to have done so, but ought to have treated the notice given by the voter as insufficient. In my opinion this was a matter entirely between the revising barrister and the voter. The revising barrister was not bound to hand the notice given by the voter to any other person, and no other person had any right to see it. It was a matter solely for the decision of the revising barrister, and I find nothing in any statute to give an appeal from his decision.

CHARLES, J. I am of the same opinion. I do not think that the legislature has given any right of appeal in cases of this description. The right of appeal from a revising barrister is still governed by the 42nd section of the Parliamentary Registration Act, 1843, and exists only with reference to the voters there mentioned. A voter may by the 17th section of the Act object to the name of another person being inserted in the list, and if he does he must give notice to the overseers and to the person objected to, and a list of the persons objected to must be published. By the 39th section, again, a voter is entitled to oppose the claim of any person who has been omitted from the list to have his name inserted. There, in the case of a person not on the list, the machinery is quite different, and he is not entitled, as a person is whose name is on the list, to notice before the sitting of the Court; but the person intending to oppose the claim may give notice in writing in the Court to the revising barrister of his intention to oppose the claim, and is thereupon to be admitted to do so. In such a case there would be an appeal under the 42nd section. I fail, however, to see, although I endeavoured to follow the argument of the counsel for the objector, how the voter in this case can be considered as a person making a claim to have his name inserted in the list. He was a person whose name was already inserted in the list, and who, therefore, had a right, in the absence of any notice of objection being served upon him, to assume that his name was duly on the list, and yet it is suggested that he should be placed in the disadvantageous position of a person whose name is not upon the list at all. By the Parliamentary and Municipal

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Registration Act, 1878, s. 28, sub-s. 14, where the name of a person appears more than once upon a list, the revising barrister has to inquire whether the entries relate to the same person, and if they prove to relate to the same person he retains one of the entries for voting, and places against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification there referred to. Then the section goes on to empower the person to select the entry to be retained for voting by notice in writing delivered to the revising barrister. This was done in the present case. The voter delivered a notice to the revising barrister that he wished to vote for his place of business, and not for his place of abode. It thereupon became the duty of the revising barrister to mark the list accordingly. Yet it is said that the Act of 1843 empowers a properly qualified person to object and to appeal under the 42nd section of the Act against the decision of the revising barrister. I see no section in the Act which gives any such right. The objector cannot rely upon the 39th section, because the person objected to was already on the list, and I do not think that he can in any sense be deemed to be a claimant. It follows that the objector cannot avail himself of the 42nd section, and the rule must therefore be discharged.

Rule discharged.

Solicitors for prosecutor: *Crowders & Vizard, for G. J. Lynskey, Liverpool.*

Solicitors for defendant Chadwick: *Pritchard, Englefield & Co., for Barrell, Rodway & Co., Liverpool.*

J. F. C.

TREADGOLD *v.* THE TOWN CLERK OF GRANTHAM AND ANOTHER. 1894 *Nov.* 14.

Parliament — Franchise — Registration—Old Lodgers' List—Claim—Mistake —Power of Amendment—Revising Barrister—Discretion—Omission of Name of Parliamentary Borough in Claim—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 28, *sub-s.* 2.

A claim to be on the old lodgers' list of voters was duly sent in to the overseers of a parish within a parliamentary borough. The claim followed the statutory form applicable to old lodger claims in all respects, except that the name of the parliamentary borough was omitted. In the declaration accompanying the claim the claimant stated that he was on the register of parliamentary electors "for the said parliamentary borough" in respect of the same lodgings. The overseers duly published the claim in the list of old lodger claimants. On its coming before the revising barrister he refused to amend by inserting the name of the borough, and expunged the claimant's name from the list:—

Held, that the omission of the name of the borough was a mistake which the revising barrister had power to amend, and ought to have amended, under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878.

CASE stated by the revising barrister for the parliamentary borough of Grantham.

At a court held at Grantham before the revising barrister, the appellant, Thomas George Treadgold, claimed, under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 30, sub-s. 2, to have his name inserted in the old lodgers' list. On or before the previous 25th of July the notice of claim was duly served on the overseers of the parish of Little Gonerby, which is within the parliamentary borough of Grantham, and the overseers duly published the claim in the list of old lodger claimants. The notice of claim and the accompanying declaration were in the form H No. 2 of the forms given in the precept to the overseers of a parish in a parliamentary borough in the Registration Order, 1889, and were as follows:—

"Parliamentary Boroughs.
"Old Lodgers.

"To the overseers of the parish (or township) of Little Gonerby. I claim to have my name inserted as a lodger among

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the parliamentary electors for the borough of ——— in respect of the qualification named below.

Name of claimant in full, surname being first.	Description of rooms occupied, and whether furnished or not.	Street, lane, or other place, and number (if any) of house in which lodgings situate.	Amount of rent paid.	Name and address of landlord or other person to whom rent is paid.
Treadgold, Thomas George.	Bedroom, first floor, furnished; use of sitting-room, ground floor.	8, Park Terrace	6s. per week.	Lydia Marion Treadgold, 8, Park Terrace.

"I hereby declare that I have during the twelve calendar months immediately preceding the fifteenth day of July in this year occupied as sole tenant and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of ten pounds or upwards, and I hereby declare that I am on the register of parliamentary electors for the said parliamentary borough in respect of the same lodgings, as above mentioned, and I desire to have my name inserted in the old lodgers' list.

"Dated the 24th day of July, 1894.

"Claimant's signature, Thomas George Treadgold.

"I, the undersigned, hereby declare that I have witnessed the above signature of the above-named Thomas George Treadgold, at the date stated above, and that I believe the above claim to be correct.

"Dated the 24th day of July, 1894.

"Witness's signature, James Thomas Slater.

"Residence, 123, Dudley Road, Grantham.

"Calling or occupation, Ironmonger."

There was no statutory or formal objection to the claim in writing served on the appellant or the overseers by or on behalf of any person whose name was on the list of voters for the borough. The claim was according to the form in every particular, except that the name of the borough had not been filled in. It was contended on behalf of the appellant that, in the absence

of a notice of objection, the barrister had no power to examine the claim, or to expunge the appellant's name from the old lodgers' list, and that if the barrister had the right to examine the claim, he should amend it by inserting the name of the borough (Grantham) after the words "for the borough of" in the claim.

The barrister's decision and his reasons for it were thus stated in the case:—

"I decided in accordance with *Hersant* v. *Halse* (1), that to have claimed to be registered is a necessary constituent of the qualification of a lodger, whether old or new, and that the necessity for so claiming could not be waived by the overseers' publication of a name in the old lodgers' list. I held that there was no claim duly made by the appellant to be registered for the borough of Grantham, as it was defective by reason of the omission of the name of the borough, as required by Form H No. 2 in the Order in Council of 1889. I held that the claim was bad, and I refused to amend it under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), as I considered that I had no power to make such an amendment; and, even if I had, I should not have done so, because by inserting the name of the borough I should be creating a claim for a particular borough, and should also be amending the declaration by importing the word 'Grantham' into it. I expunged the appellant's name from the list."

The names of seven other persons, whose names were set out, were expunged under similar circumstances, and the eight appeals against the revising barrister's decision were consolidated.

If the Court should be of opinion that his decision was wrong, the register was to be amended by inserting the names of Thomas George Treadgold and the seven other persons in the old lodgers' list of their respective parishes.

Thomas Terrell, for the appellant. By the Parliamentary and Municipal Registration Act, 1878, s. 22 (2) the claim of a person

(1) 18 Q. B. D. 412.

(2) Sect. 22: "Where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the

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to be entered on the old lodgers' list may be objected to, and the claimant is entitled to notice of objection. In the absence of any such notice of objection the revising barrister ought not to have expunged the name. He ought to have amended the claim under s. 28, sub-s. 2. The omission in the claim of the name of the borough was a bonâ fide mistake which misled no one.

[He was stopped.]

T. W. Chitty, for the respondents. The revising barrister was right in examining the claim and expunging the appellant's name from the list. The making of the claim is, in the case of lodgers, a necessary part of the qualification: *Hersant* v. *Halse* (1); *Jones* v. *Kent* (2); *Smith* v. *Chandler*. (3) It is essential that the claim should be made in the statutory form, and the statement of the name of the borough in respect of which it is made is of the very essence of the claim. There was in truth no claim before the revising barrister which he could entertain. If he had power to amend he has exercised his discretion, and this Court will not review it. In *Jones* v. *Kent* (2) it was not suggested that the barrister ought to have amended. In *Smith* v. *Chandler* (3)

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same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the twenty-fifth day of July.

"The overseers shall on or before the last day of July make out a list of all persons so claiming, and if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered or is dead, shall add in the margin of the list opposite his name the words 'objected to' or 'dead' as the case may be.

"The list so made out shall be signed, published, and otherwise dealt with in the same manner as the alphabetical lists mentioned in section thirteen of the Parliamentary Registration Act, 1843, and shall for the purposes of the Parliamentary Registration Acts be deemed to be lists of voters, and the provisions of the Parliamentary Registration Acts as to objections shall apply to such lists, and the persons against whose names the overseers have so written the words 'objected to' or 'dead,' shall be deemed to be duly objected to."

Sect. 28: "A revising barrister shall, with respect to the lists of voters for a parliamentary borough . . . . perform the duties and have the powers following:—

"1. He shall correct any mistake which is proved to him to have been made in any list.

"2. He may correct any mistake which is proved to him to have been made in any claim or notice of objection."

(1) 18 Q. B. D. 412.

(2) 22 Q. B. D. 204.

(3) 22 Q. B. D. 208.

the Court held that the revising barrister was right in not amending the omission in a lodger's claim of the date of the declaration of attestation; and in *Pickard* v. *Baylis* (1), where the amount of rent and the landlord's address were omitted in a new lodger's claim, and the revising barrister refused to amend, the Court declined to interfere with that exercise of his discretion.

LORD RUSSELL of KILLOWEN, C.J. I am of opinion in this case that the appeal should be allowed. The facts are that the appellant, who was an old lodger in the list of parliamentary electors for the borough of Grantham, made, on July 24, 1894, a claim to have his name continued on the coming parliamentary register. He sent in a claim in the form headed "Old Lodgers." It was addressed to the overseers of the parish of Little Gonerby, which is within the borough of Grantham, and in it he claimed to have his name inserted as a lodger "among the parliamentary electors for the borough of ——— in respect of the qualification named below." Then followed his name, the description of the rooms he occupied, the description—"8, Park Terrace"—of the house in which the lodgings were situate, the amount of rent paid, and the name and address of the landlord. He also stated in his declaration that he was already on the register of parliamentary electors "for the said parliamentary borough" in respect of the same lodgings, and that he desired to have his name inserted in the old lodgers' list. The claim and declaration were duly attested by a person who describes his residence as being in Grantham. The overseers receiving this claim perfectly well understood what it meant. They acted upon it, and sent it before the revising barrister for revision. The objection taken before him was that, in the absence of a notice of objection, he had no power to examine the claim or to expunge the appellant's name from the old lodgers' list. As regards that matter, I am of opinion that the revising barrister was right in deciding that to claim to be registered was a necessary constituent of the qualification of a lodger, and that the claim, as it stood, was bad. Then arose the question whether, if the claim as made was bad or defective in the form in which it stood, the revising barrister

(1) 5 C. P. D. 235.

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Lord Russell, C.J.

should or should not exercise his discretionary power and amend it. He declined to amend, and he has given as his reason that, in his judgment, if he had amended, it would have been making a new claim for a particular borough. In my view it would not have been making a new claim, but amending an existing claim, and amending an omission which occurred purely by mistake—a mistake which could not and did not mislead the overseers or any other person. In that state of things we have to decide whether the revising barrister ought not to have exercised his discretion by amending. Counsel for the respondents has not argued—and indeed it could not be argued—that we have no power to review the discretion of the barrister at all. The case could not be put so high as that. The barrister has a discretion, but it must be exercised judicially; and, if there were no reasons, such as appear in some of the cases, to justify his refusal to amend, then I think that he ought to have amended, and to have exercised his powers by putting the name of the borough—Grantham—in the claim.

My reasons for coming to that conclusion are, as I have stated, that the claimant was stated to be on the old register, and neither the overseers nor any other persons were misled by the omission of the name of the borough.

It is unnecessary to consider minutely the cases cited by the respondents' counsel, because those cases differ in their circumstances from the present. In *Jones* v. *Kent* (1) the claimant sent in a claim, in which the declaration of residence and the attestation were dated July 6, in respect of residence up to July 15. That was clearly wrong. The decision seems simply to amount to this—that the claim was not valid. It does not apply to this case, because in *Jones* v. *Kent* (1) there was no application to the barrister to amend. In *Smith* v. *Chandler* (2) the point was this: the statute required that the claim should be attested and the attestation dated; but the declaration of attestation was not dated as the statute required, and the Court seem to have arrived at the conclusion that this was not a mere mistake, but an omission, as the revising barrister knew, deliberately made and acted upon. Under those circumstances

(1) 22 Q. B. D. 204. (2) 22 Q. B. D. 208.

they held that he was right in not amending the claim. *Pickard* v. *Baylis* (1) was also a wholly different case. The claim was a new lodger claim, and a paper or a claim form was sent in, which did not state the qualification on which, in order to make it a good one, the claim must necessarily be based. It omitted to state whether the lodgings were furnished or unfurnished, whether any rent was paid, and what was the landlord's address. The thing was wholly wrong, and disclosed no qualification at all. The case, therefore, differs widely from this. In my opinion, whilst, on the one hand, this Court should be very vigilant to see that no technicalities are allowed to prevail in favour of claims which are not substantially good, on the other hand, technicalities should not be allowed to defeat claims which are good in substance.

I am of opinion that our judgment should be for the appellant.

HAWKINS, J. I so entirely concur in the judgment which has been delivered by my lord that I think it unnecessary for me to add anything.

WRIGHT, J. I am of the same opinion.

Judgment for the appellant.

Solicitor for appellant: *W. H. Norledge.*

Solicitors for respondents: *Paterson, Snow, Bloxam, & Kinder.*

(1) 5 C. P. D. 235.

W. A.

1894
Nov. 22.

LORD MOSTYN, APPELLANT *v.* LONDON (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Money received for Fine on Renewal of Lease—Direction in Will to Invest in Land—Temporary Deposit in Bank at Interest—Claim of Exemption—"Applied as Productive Capital"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Schedule* (*A*), *No. II.*, *r.* 5.

Money, which had been received by the appellant for fines on the renewal of leases, had been placed at a bank, on deposit at interest, in the names of the trustees of a will, under which the appellant was tenant for life. By the will fines on renewals of leases were to be invested in the purchase of freehold, copyhold, or leasehold property. The money was placed at the bank temporarily, until required for permanent investment, and interest was received on it by the appellant, who paid income tax on such interest.

The appellant claimed exemption from income tax on the money so placed on deposit, on the ground that such money had been applied as productive capital, on which a profit had arisen otherwise chargeable for the year in which the assessment was made, within the meaning of the 5th rule in s. 60, Schedule (A), No. II., of the Income Tax Act, 1842, so as to be exempt under the proviso contained in that rule :—

Held, that the money on which exemption was claimed, having been temporarily placed on deposit, had not been "applied as productive capital," within the meaning of the rule, and therefore the appellant was not entitled to exemption.

CASE stated by Commissioners of Income Tax.

Lord Mostyn appealed against an assessment of 1795*l.* under Schedule A, in respect of fines, made according to the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Schedule A, No. II., rule 5. (1)

During the year commencing in April, 1890, and terminating in April, 1891, the appellant, Lord Mostyn, who was tenant for

(1) This section provides that amongst the matters made chargeable thereby shall be included "All fines received in consideration of any demise of lands or tenements (not being parcel of a manor or royalty demisable by the custom thereof) on the amount so received within the year preceding by or on account of the party; Provided that in case the party chargeable shall prove, to the satisfaction of the Commissioners for general purposes in the district, that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise otherwise chargeable under this Act, for the year in which the assessment shall be made, it shall be lawful for the said Commissioners to discharge the amount so applied from the profits liable to assessment under this rule."

life, under the will of his late father, of certain freehold property, which was let upon leases, which were renewable upon payment by the lessees of certain prescribed fines, as such tenant for life granted renewals of certain leases, and upon such renewals received, as agent for the trustees of the will, fines, amounting to 1795*l.* 6*s.* 11*d.*, from lessees, of which a portion, amounting to 906*l.* 13*s.* 7*d.*, was placed upon deposit at the London and Westminster Bank, in the names of the trustees, and remained on such deposit until the end of the financial year ending in April, 1892.

Interest on some of such deposits, together with other deposits, was paid to the trustees by the bank up to April, 1891, amounting together to 44*l.* 1*s.* 10*d.*, upon which Lord Mostyn agreed to pay income-tax, but contended that, as the fines in question, amounting to 906*l.*, had been so placed on deposit producing the said amount of interest for the year of assessment, the fines had been applied as productive capital, on which a profit had arisen otherwise chargeable under the Income Tax Acts, within the effect and operation of the proviso to the above-mentioned section, and that the Commissioners should, in accordance with such proviso, discharge the amount so applied from the profits liable to assessment.

The appellant stated at the hearing that under the will of his father, which he produced, all fines on renewals of leases should, after payment of debts and reduction of mortgages, be invested or expended in the purchase of freehold, copyhold, or leasehold property, and that the tenant for life therefore received and must apply such fines as capital, and had no power to appropriate them to his own use, or in any way utilise them as income.

The fines were placed in the bank temporarily on deposit as received, and remained there until required for permanent investment.

It was contended by the surveyor of taxes on the above facts that the placing of money in a bank on deposit was not an application of productive capital, within the meaning of the Act, the appellant having admitted that the money was only placed in the bank temporarily until such time as it was required for permanent investment.

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The Commissioners confirmed the assessment.

The question for the opinion of the Court was:—

Whether the respective amounts placed on deposit as stated had been applied as productive capital, on which a profit had arisen otherwise chargeable under the Income Tax Acts, within the meaning of the proviso.

Pollard, (*Bucknill*, *Q.C.*, with him), for the appellant. The assessment is wrong, and the appellant is entitled to the exemption which he claims. The 906*l.* 13*s.* 7*d.*, by being placed at the bank on deposit, has been applied as productive capital, within the meaning of the Act, and a profit has arisen on it otherwise chargeable under the Act, for it is stated in the case that interest on the deposits, amounting to 44*l.* 1*s.* 10*d.*, has been received, and that sum is admitted to be chargeable with income tax. The case therefore comes within the words of the proviso.

The Solicitor-General, *Lockwood*, *Q.C.* (*Danckwerts*, with him), for the respondent. This money does not come within the terms of the proviso, which is intended to apply to the case of a permanent investment, and not to a mere temporary loan. If the appellant's contention were correct, he could entitle himself to exemption by lending the money for any period, however short, provided he received some interest on it. Moreover, the words of the proviso are not imperative, but only give the Commissioners a discretion to discharge the amount, if they think it just and reasonable to do so.

WRIGHT, J. I have come to the conclusion that this appeal fails. I doubt whether the proviso in s. 60, Schedule (A), No. II. rule 5, of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), does more than give the Commissioners a discretionary power to discharge the amount applied from profits liable to assessment: but it is not necessary to decide that question, for the ground on which I think the case ought to be decided is this. The words of the proviso are, "provided that in case the party chargeable shall prove, to the satisfaction of the Commissioners, ... that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise otherwise chargeable

under this Act for the year in which the assessment shall be made, it shall be lawful for the said Commissioners to discharge the amount so applied from the profits liable to assessment under this rule." In my opinion, if these words are read fairly, according to the ordinary meaning of the English language, they imply something more than a mere temporary deposit at a bank. The word "applied" must mean something more than what has been done in the present case, for the fines here cannot be said to have been applied, but are rather held in suspense until it is decided how they are to be applied. I think that a temporary deposit such as this is not an application of productive capital, for that must mean something more than a deposit by way of loan. I also think that the word "productive" is not applicable here, but "applied" is the word which is most inconsistent with the contention on behalf of the appellant. For these reasons, I am of opinion that the appeal fails, and the decision of the Commissioners ought to be upheld.

COLLINS, J. I am of the same opinion. It is perhaps somewhat difficult to see exactly what the legislature intended by this proviso, but I am clear that it was not intended to include a temporary deposit at a bank. There must be some element of permanence, and, as Wright, J., has said, it is not enough that the money should be held in suspense until the owner has determined how he will ultimately apply it.

Appeal dismissed.

Solicitors for appellant: *Hulberts & Hussey.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

P. B. H.

1894
Dec. 3.

In re HOLMES AND FORMBY.

Landlord and Tenant—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6, 7, 24—*Compensation for Improvements—Arbitration—Counter-Notice of Claim by Landlord—Award to Landlord of amount in excess of Tenant's Claim—Enforcement of Payment—County Court—Jurisdiction—Prohibition.*

In an arbitration under the Agricultural Holdings (England) Act, 1883, where a greater amount is awarded to the landlord in respect of waste and breaches of covenant committed by the tenant than is awarded to the tenant as compensation for improvements, the landlord cannot recover the balance under the procedure given by the Act.

Application for a writ of prohibition.

The following facts appeared from the affidavits used in the matter of the application:—

The applicant, Formby, was tenant to Holmes of farm lands, messuages, tenements and cottages in the county of Norfolk, under certain leases and an agreement made between them. The tenancy expired in October, 1893, and previous to that date the tenant gave notice of his intention to claim compensation for improvements under the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61). (1) The landlord thereupon gave counter-notices under the same Act of his in-

(1) The Agricultural Holdings (England) Act, 1883, provides (s. 1) for compensation to a tenant on quitting his holding for certain improvements specified in the Act.

By s. 6: "In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account in reduction thereof" (inter alia) (c) "any sums due to the landlord in respect of rent or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant."

Sect. 7 provides that a tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim; and "where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agree-

tention to make claims in respect of waste and breaches of covenant and agreement committed by Formby during his tenancy.

The parties being unable to agree on the amount of compensation to be paid, two referees and an umpire were appointed under the Act. In the result of the reference the umpire awarded that the sum of 18*l.* 16*s.* 5*d.* was due from the landlord to the tenant for improvements, and that a sum of 49*l.* 7*s.* was due from the tenant to the landlord for waste and breaches of covenant and agreement committed by the tenant, leaving a balance due from him to the landlord of 30*l.* 10*s.* 7*d.* The award set forth particulars of the matters in respect of which it was made with the sum awarded in respect of each matter.

The sum awarded to the landlord not having being paid within fourteen days from the date of the award, he obtained an order for payment thereof from the county court judge of the district, and execution was issued. Thereupon the tenant took out this summons for a writ of prohibition, to be directed to the county court judge and the landlord, to prohibit them from further proceeding in the matter so far as the award was in respect of matters not within the Agricultural Holdings Act, upon the ground that the county court had exceeded its jurisdiction and that the award was bad on the face of it.

The summons was referred to the Court by Day, J., at chambers.

Channell, Q.C. (*Frederick Low*, with him), for the applicant. For the purposes of the procedure under the Agricultural

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ment. Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim."

By s. 8: Where the landlord and the tenant do not agree on the amount and mode and time of payment of compensation to be paid under the Act, the difference shall be settled by a reference, and s. 9 provides that the reference shall be to a referee, or to two referees and an umpire, to be appointed as therein prescribed.

By s. 24: Where any money awarded is not paid within fourteen days after the time when it is awarded to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

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Holdings (England) Act, 1883, the umpire had no power to award to the landlord the amount by which the sums allowed to him exceeded those allowed to the tenant, and the county court judge, in making an order for payment of that amount, exceeded his jurisdiction. The language of s. 6 is clear; the matters in respect of which the landlord may claim can only be taken into account "in reduction of" the amount payable to the tenant in respect of improvements. Sect. 7 merely provides the procedure to be followed; it does not give the landlord any right which he had not before the Act was passed. The counter-notice which he may give has reference only to the matters to be taken into account in reduction of the amount of the compensation payable to the tenant; and the words "other agreement" refer to agreements in respect of the matters specified in s. 6. Possibly the landlord may be entitled to recover the excess by some proceeding, not under the Act, founded on the agreement of the parties, but he cannot recover it under the Act. Even where there has been an agreement for compensation between the landlord and the tenant the county court judge has no power under s. 24 to enforce an award for compensation in respect of matters not within the Act: *Farquharson* v. *Morgan.* (1)

Jelf, Q.C. (*H. F. Wilson,* with him), for the landlord. The umpire had power under the Act to award to the landlord the amount by which his claim exceeded that of the tenant, and the order made by the county court was, therefore, right. Sect. 6 must be construed so as to include a reduction which not only reduces the tenant's claim to nothing, but leaves a balance in favour of the landlord. The enactment was passed in view of the right to counter-claim in an action, given for the first time by the Judicature Acts. Sect. 7 recognises that right by providing that the landlord may give a counter-notice of his intention to make a claim. If the contention on behalf of the tenant be well founded the Act (which is very badly drawn) becomes unworkable, and leads to results manifestly absurd. Sect. 19 provides that the award shall not award a sum generally for compensation, but shall, as far as possible, specify "the

(1) [1894] 1 Q. B. 552.

several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation," and "the sum awarded in respect of each improvement, act, matter, and thing." The landlord may claim unliquidated damages for dilapidation, &c. The award is only binding by force of the statute; and if the landlord's claim overtops that of the tenant, the former must, in order to recover the amount in excess, go to another tribunal which may differ from the arbitrator as to the amount of damages for particular breaches. It is the tenant who must commence proceedings under the Act. His claim may be wholly unfounded, so that nothing is found to be due to him, whilst the landlord's counter-notice may be in respect of a good claim for rent. It would be a strange result if he could not obtain his rent in these proceedings under the Act.

GRANTHAM, J. The Agricultural Holdings Act, 1883, was passed for the benefit of a class, the tenants. The Act of 1875 was thought not to be sufficiently for the benefit of the tenants; it was amended in 1876, and then came the Act of 1883. It was supposed that the tenants would gain much benefit from that statute; but it gave them no more than, in some counties at any rate, they already had by custom. The Act was intended to give them compensation for unexhausted improvements which, it was supposed, they could not otherwise get, and to provide a procedure for the ascertainment and recovery of such compensation. Whilst the matter was in course of debate it was urged that it would be a hardship upon a landlord, having a good claim against his tenant, and being saddled perhaps with the payment of a considerable sum for unexhausted improvements, if the tenant were able to put the money in his pocket and go off, leaving the landlord unable to get payment of what was due to him. Two provisions were therefore inserted in the Act. First, the landlord, on paying compensation to a tenant under the Act, was entitled to obtain from the county court a charge on the holding to the amount of the compensation paid; and, secondly, if he had any claim against the tenant less than or equivalent

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Grantham, J.

to the tenant's claim against him, he could set off his claim against that of the tenant. I feel confident that if, as has been contended, the legislature had intended to give the landlord power to claim as fully as the tenant the Act would have been very different. The answer to that contention is that the Act as passed in the House of Commons was intended to benefit, and based upon the principle of benefiting, the tenant. Are there any words in the statute which give the umpire or the county court judge power to give the landlord compensation over and beyond the amount of compensation allowed to the tenant? I am of opinion that there are not. Mr. Jelf's argument was that when the Agricultural Holdings Act, 1883, was passed, the power to counter-claim had already been introduced by the Judicature Acts, and that on this account it must be assumed that the legislature in the Act of 1883 intended that the landlord should be able to recover more than the sum awarded to the tenant. But we have to take the actual language of the Act. Although it may be badly drawn, we cannot interpolate into it words which are not there. Taking the Act as it is, I have no doubt what our judgment should be. The applicant is entitled to a writ of prohibition so far as the award goes beyond what is warranted by the Agricultural Holdings Act, 1883.

LAWRANCE, J. I am entirely of the same opinion. If the case had not been so strenuously argued by Mr. Jelf, I should have thought it unarguable. There are two answers to his contention. The first is, that the Act contains no provision enabling the landlord to start proceedings for enforcing his claim, and one would certainly expect to find such a provision if the Act had been passed with the object of providing for the adjustment between landlord and tenant of all their respective rights. As it stands, if the landlord has a good claim for 1000*l.*, he cannot make it under the Act unless the tenant has made a claim; he can only counter-claim in answer to the tenant's claim. The other answer is to be found in the language of the Act. The question is whether, when the landlord's claim overtops that of the tenant, the landlord can recover the balance under the procedure given by the Act. I agree that, if he cannot, the

absurdity pointed out by Mr. Jelf follows, and I should more fully agree with the stricture he passed upon the Act, were it not that the Act does not deprive the landlord of any right which he had before it was passed. Sect. 6 enacts that in ascertaining the amount of compensation under the Act, payable to the tenant in respect of any improvement, certain specified things in respect of which the landlord may claim "shall be taken into account in reduction thereof." The language of that section seems to me clear. If the landlord is allowed less than is allowed to the tenant, the amount is to be deducted from the tenant's claim; if the landlord is allowed an equal amount, it can be set off against the tenant's claim, and he recovers nothing; but if the amount allowed to the landlord overtops that allowed to the tenant, the landlord cannot under the Act recover the excess. I am of opinion, therefore, that the applicant is entitled to a prohibition in the terms of the summons.

Judgment for a prohibition accordingly.

Solicitors for applicant: *Crowders & Vizard, for Mills & Reeve, Norwich.*

Solicitors for landlord: *White, Borrett & Co., for Garrod & Wilson, Norwich.*

W. A.

1894
Dec. 7.

IN RE KELLY.

Solicitor—Permitting unqualified Person to use Solicitor's name in Actions, &c. —Punishment—Discretion of Court—Striking off Roll—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

Per Curiam: Sect. 32 of 6 & 7 Vict. c. 73, which enacts that a solicitor "shall and may be" struck off the roll for certain specified offences, does not give the Court a discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll.

APPLICATION to strike a solicitor off the roll of solicitors. The case came before the Court on the report of a committee, appointed under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), of the Incorporated Law Society.

An application was duly made to the committee that the solicitor might be required to answer the allegations contained in certain affidavits, and that his name might be struck off the roll of solicitors, or that he might be suspended from practice as a solicitor, or that such other order might be made as the Court should think right, on the ground that the matters of fact stated in the affidavits constituted professional misconduct on his part in his capacity of solicitor of the Supreme Court of Judicature in England.

The charge made was that the solicitor wilfully and knowingly permitted his name to be made use of in certain actions, suits, and matters upon the account and for the profit of one Haslewood, an unqualified person.

The committee duly heard the application, and made their report setting forth the acts of misconduct alleged and the nature of the evidence by which they were proved; and the committee found that the charge was proved, and that the solicitor had been guilty of the professional misconduct alleged.

Hollams, for the Incorporated Law Society, after bringing the report before the Court, contended that s. 32 of 6 & 7 Vict. c. 73 (1), gave the Court no discretion as to the punishment to

(1) By 6 & 7 Vict. c. 73, s. 32: "If any attorney or solicitor shall wilfully or knowingly act as agent in any action or suit in any court of law or

be inflicted, but that they were bound to strike the solicitor off the roll. [He called the attention of the Court to *Re Two Solicitors* (1), *Re Grayston* (2), *Re Sykes* (3), and *In re Lamb.* (4)]

Overend, for the solicitor, contended that the Court had a discretion to inflict a less punishment than that of striking off the roll.

POLLOCK, B. In this case I regret to say that the facts proved so clearly establish the allegations against the solicitor, and the offence is of so continuous a character, that this Court can, in my opinion, have no option but to deal with the matter by treating it as a series of acts done by him which shew that he is unfitted, and permanently unfitted, to hold the office and position of a solicitor of this Court. It is, therefore, our duty, I think, to say that he should be struck off the roll. I come to this conclusion apart from the statute, and apart from the question of its proper construction; but I think, after our attention has properly been called to the matter, and certain cases have been cited by counsel for the Incorporated Law Society, we ought to say that we have no doubt that the true meaning of the words "shall and may be struck off the roll" is that this Court has no discretion, but is bound, in obedience to the statute, if the facts are proved to our satisfaction, to strike the solicitor off the roll. The word "shall" clearly would leave no doubt whatever upon the question; the only doubt which can arise is from the introduction of the words "and may be." There is, I agree, some little difficulty in seeing why those words should have been

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equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person . . . and complaint shall be made thereof in a summary way to any of the superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the Court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor."

(1) 28 Sol. J. 90.
(2) 32 Sol. J. 680.
(3) 34 Sol. J. 285.
(4) 23 Q. B. D. 477.

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IN RE KELLY.

Pollock, B.

inserted; but I think that the statute 22 Geo. 2, c. 46, gives ground for the course of the subsequent legislation, because it shews that at the date of the passing of that Act, now so many years ago, the legislature had dealt with this very offence, apart from any judicial discretion, and apart from the sort of domestic forum by which these matters were governed in the Courts, and had there used the words (where the offence was proved to the satisfaction of the Court), "Every such attorney or solicitor shall be struck off the roll." Therefore, it is not new legislation; and I confess I cannot see why, because we have a discretion in other matters where there is no statute, we ought to say that we have a discretion where there is a statute containing extremely plain words to shew that we have not.

GRANTHAM, J. I also have no doubt upon the question. The facts proved in this case establish that, not only in one but in many instances, this solicitor committed serious breaches against the law relating to solicitors, and therefore, under those circumstances, there is no doubt we should punish him by striking him off the roll. But I think we should express an opinion upon the point, which is said to be a doubtful one—and from the expression of opinion of some of the judges it may be doubtful—as to what is the meaning of the words "shall and may." In *In re Lamb* (1) the Court of Appeal said that, whatever might be the meaning of the words "shall and may," they were quite clear that where a person has been struck off the roll he is for ever after disabled from practising as an attorney or solicitor. It seems to me that if the view taken by Lopes, L.J., in that case be correct—namely, that there is a discretion in the Court in every case—then s. 32 should read, "Every such attorney or solicitor shall and may be struck off the roll; and, *if so struck off*, shall for ever after be disabled from practising as attorney or solicitor." But the section gives no such alternative. The words are, "shall and may be struck off the roll, and for ever after be disqualified from practising as an attorney or solicitor." If there were a discretion in the Court to inflict a punishment short of striking off the roll, then it

(1) 23 Q. B. D. 477.

seems to me that the section would probably have had some such words as I have mentioned inserted in it. Those words not being there, I think that there is intended to be only one penalty for the offence, and that the Court has no discretion to inflict any other penalty. Whether it may be desirable to give the Court such a discretion is another matter.

Order to strike the solicitor off the roll.

Solicitor for the Incorporated Law Society: *E. W. Williamson.*
Solicitors for respondent: *Kelly & Co.*

W. A.

IN RE ALICE ALDERSON. EX PARTE JACKSON.

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Oct. 29.

Bankruptcy—Act of Bankruptcy—Debtor "absenting" himself—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*d*).

In order to shew that a debtor has committed an act of bankruptcy by "absenting" himself within the meaning of s. 4, sub-s. 1 (*d*), of the Bankruptcy Act, 1883, it is not necessary to shew actual physical absence from a particular place.

A judgment debtor, who previous to the judgment had adopted an assumed name, after the judgment removed from the furnished lodgings in which she had been residing to another residence. She left no address at the lodgings, and did not give the address of her new residence to her solicitor, through whom she was being pressed to comply with the judgment. She continued to reside in the residence to which she had removed and to be known by the assumed name until, more than three months afterwards, the judgment creditor discovered her, and presented a bankruptcy petition against her:—

Held, that the debtor had committed an act of bankruptcy, on which the creditor was entitled to present a petition, by absenting herself with intent to defeat or delay her creditors within the meaning of the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*d*).

APPEAL from a decision of the registrar of the county court of Kent, holden at Tunbridge Wells, making a receiving order against the debtor.

The petitioning creditor was the trustee in bankruptcy of the estate of William Alderson, a brother of the debtor.

By an order of the Court of Appeal made on August 8, 1893, it was declared that the petitioning creditor, as such trustee, was entitled as against the debtor to certain shares in several

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companies, and the debtor was ordered to transfer to the petitioning creditor such of the shares as had not been sold, and to pay over the sums received in respect of such shares as had been sold.

The petitioning creditor alleged that these sums amounted to 2802*l.* 7*s.*, and this amount, together with the costs of the proceedings, constituted the debt on which the petition was founded.

The act of bankruptcy alleged in the petition, which was presented on June 22, 1894, was that the debtor had during the preceding three months absented herself with intent to defeat or delay her creditors. In certain proceedings previous to those in which the order of the Court of Appeal of August 8, 1893, was made, the debtor had established her title against the petitioning creditor, as trustee in bankruptcy of her brother's estate, to certain other shares, and was preferring a claim against the petitioning creditor with respect to those shares, on the ground that she had been prevented from dealing with them for a long period, during which they had largely fallen in value. The debtor's claim upon this ground was larger than the debt on which the petition was based.

In June, 1893, while this claim and the proceedings in which the Court of Appeal afterwards gave judgment in favour of the petitioning creditor were both pending, the debtor went to Tunbridge Wells, and there took up her residence in furnished apartments under the name of Fry. Immediately after the decision of the Court of Appeal of August 8, 1893, the petitioning creditor proceeded to press the debtor, through her solicitor, to comply with the judgment. On August 29 the debtor left the apartments in which she had been residing, and took up her residence in an unfurnished house, also in Tunbridge Wells. The debtor left no address at the apartments, and did not furnish her solicitor with her new address, and on September 6 wrote to him withdrawing his retainer, without giving any address. The debtor continued to reside in the house to which she had removed under the name of Fry until the petitioning creditor discovered her residence in June, 1894, when he immediately presented the petition against her. The registrar of the county

court held that the debtor had committed the act of bankruptcy alleged in the petition, and made a receiving order.

The debtor appealed.

Ashton Cross, for the debtor. The debtor did not absent herself within the meaning of s. 4 of the Bankruptcy Act, 1883. (1) In order to bring a debtor within that section, it is necessary to shew that he has absented himself from his residence or his place of business, or at any rate from some place of usual resort. Upon the facts of this case the debtor cannot be said to have absented herself. She took up her residence at Tunbridge Wells under an assumed name, at a time previous to that at which the judgment of the Court of Appeal declared the debt on which the petition is based to be a debt. At that time there was no creditor to defeat or delay. Consequently, it was impossible for her to commit the act of bankruptcy. After the judgment of the Court of Appeal was given all that the debtor did was, probably from motives of economy, to remove from lodgings into a house in the same town, in which she lived under the same name. She had no other residence or place of business or resort, and never absented herself from that residence.

Boxall, for the petitioning creditor. The debtor began to absent herself at the end of August, 1893, by quitting the lodgings she had occupied without leaving an address, and continued to absent herself from that time. The absenting referred to by the section is not a single but a continuing act. The inference to be drawn from her letter to her solicitor without giving any address is that she absented herself to avoid process and delay her creditor. In *Bernasconi* v. *Farebrother* (2) it was held that it was an act of bankruptcy for a debtor to absent himself from a particular creditor. In *Robson* v. *Rolls* (3) it was held that a debtor who abstained from going to a particular

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides as follows: "Sect. 4 (1). A debtor commits an act of bankruptcy in each of the following cases . . . . (*d.*) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house."

(2) 10 B. & C. 549.

(3) 2 Moore & Scott, 786.

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place through the apprehension of process had absented himself and thereby committed an act of bankruptcy. *Ex parte Dean, In re Dean* (1), is to the same effect.

Further, actual physical absence is not necessary to comply with the section. Absenting may equally be carried out by change of the debtor's name, or of the name of his house, or by a debtor remaining in his usual place of residence in disguise.

Ashton Cross, in reply. The cases cited do not apply to the circumstances of this case. *Ex parte Meyer, In re Stephany* (2), is a later decision to a contrary effect.

[VAUGHAN WILLIAMS, J. Do you say that a debtor attending a meeting of his creditors in disguise would not, although physically present, be absenting himself from it?]

No; but in this case the debtor never did any act which would correspond with the putting on of a disguise. She merely continued to be called by a name which she had rightfully assumed before the petitioning creditor's debt was pronounced to be a debt.

VAUGHAN WILLIAMS, J. I am of opinion that the decision of the registrar was right. I think that for a debtor to absent himself with intent to defeat or delay his creditors is a continuing act of bankruptcy. It is quite plain that some acts of bankruptcy are continuing. Remaining abroad from the realm is admittedly so. I am unable to see why, if remaining abroad from the realm is a continuing act of bankruptcy, remaining abroad from a man's residence, place of business, or place of resort is not so. It may be asked why, if this be so, does the legislature say in the one case "being out of England, remains out of England," and in the other simply "absents himself." The answer is, that in the former case a man may be abroad when his financial difficulties culminate, and so the abstaining from returning to the country to meet the difficulties after they have culminated is made an act of bankruptcy, while in the latter case there must necessarily be a beginning of the debtor's absenting himself. In my judgment, then, for a man to absent

(1) 2 M. D. & D. 127. (2) Law Rep. 7 Ch. 188.

himself with intent to defeat or delay his creditors is a continuing act of bankruptcy.

That being so, the counsel who appears in support of the appeal asks, From what place did the debtor in this case absent herself? I do not assent to the proposition that in order to constitute an absenting within the meaning of the section there need be an absenting from any particular place by physical bodily absence. In the course of the argument I put the question whether a debtor would not be absenting himself from a meeting of his creditors if he went to it in disguise and was physically present. It was not disputed that that would be so. The moment that point is conceded it is quite plain that the position that the absence must be physical absence must be given up, because a person may be absent from a meeting at which he is bodily present. I have said this because I prefer to decide the question now that it has been raised; but I am not quite certain that it is necessary for the decision of this case.

With respect to this case, it appears that in June, 1893, Miss Alderson, at a time when she was putting forward a larger claim against the petitioning creditor, as the trustee of the estate of her brother, than he had against her, went to Tunbridge Wells and there went into lodgings under the name of Miss Fry. She had, as far as we know, no creditor other than the trustee of her brother's estate; and if she thought she had a larger claim against him than his debt it cannot be said that she had at that time any intent to defeat and delay him.

But presently circumstances altered, and the Court of Appeal decided that the brother's trustee was entitled to a number of shares in various companies which Miss Alderson held, and ordered her to transfer to the trustee all such shares as had not been sold, and to pay over all sums received by her from the sale of such as had been sold. Soon after this decision was given Miss Alderson left the lodgings she had been occupying and went to an unfurnished house. It is suggested that she may have taken that step from motives of economy; but we must look at the evidence to see whether it was done in order to avoid the claim of the trustee. Now, it appears that not only did she not furnish her solicitor with her new address, but that

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she presently wrote to him on some matter of business, and did not then give him her address. I take the same view of this course of action as her own solicitor. It is quite plain from the correspondence that he thought that her object in not giving him her address was to prevent his being made a channel of communication with her, lest a messenger should be sent who might see her and serve her with process. There is evidence, therefore, that what she did was done to defeat and delay her creditors. In my judgment the debtor, by absenting herself from the lodgings and removing to the unfurnished house, absented herself with intent to defeat or delay her creditors within the meaning of s. 4, sub-s. 1 (*d*), of the Bankruptcy Act, 1883.

In the first place, then, I think that it is not necessary in order to satisfy the section to shew that a debtor has physically absented himself from a particular place, and, secondly, if this be necessary, I think there is sufficient evidence that the debtor did physically absent herself from the lodgings for the express purpose of defeating and delaying her creditor.

KENNEDY, J. I entirely concur.

Appeal dismissed.

Solicitors for appellant: *Speechly, Mumford, Landon, & Rogers.*
Solicitor for respondent: *E. Swain.*

J. F. C.

IN RE KING & BEESLEY. EX PARTE KING & BEESLEY. 1894

Oct. 25.

Bankruptcy—Petitioning Creditor's Debt—Merger in Judgment—Existence of Original Debt for Purpose of Bankruptcy Proceedings—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 2.

The general rule that, where judgment has been recovered upon a simple contract debt, the original debt is for most purposes merged in the judgment, does not cause the judgment to operate as an extinguishment of the debt for the purpose of bankruptcy proceedings, and such debt is still available as a petitioning creditor's debt. The law in this respect has not been altered by the Bankruptcy Act, 1883.

APPEAL of the debtors from a receiving order made by the registrar of the Birmingham County Court.

On April 20, 1894, the debtors executed a deed of assignment for the benefit of their creditors. They were at that time indebted to the petitioning creditor in the sum of 12*l.* 13*s.* for goods sold and delivered, and there was also an action pending against them at the suit of the petitioning creditor upon a dishonoured bill of exchange; on April 27 judgment was signed in the action. On April 28 the petitioning creditor filed a petition against the debtors, relying on the assignment as an act of bankruptcy; the petition alleged that the debtors were indebted to him in the sum of 12*l.* 13*s.* for goods sold and delivered, and 64*l.* for principal of and interest upon a dishonoured bill of exchange, and that he held no security for his debt save and except a final judgment, execution upon which had not been stayed. At the hearing before the registrar it was objected on behalf of the debtors that the petitioning creditor's debt must be the same at the date of the act of bankruptcy and at the date of the hearing of the petition; that in the present case the original debt in respect of the bill of exchange, which existed at the date of the act of bankruptcy, had been merged in the judgment, and was therefore no longer available to support a bankruptcy petition. The registrar made a receiving order, and the debtors appealed.

Muir Mackenzie, for the debtors. The receiving order was improperly made. The debt upon which an adjudication in

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bankruptcy is founded must be the debt which existed at the date of the act of bankruptcy: *Ex parte Hayward, In re Hayward* (1); *In re Whelan, Ex parte Sadler.* (2) In the present case, the debt which existed at the date of the act of bankruptcy has been merged in and extinguished by the judgment. A debt which is only payable in futuro will not support a petition for adjudication: *Ex parte Sturt, In re Pearcy* (3); the test in every case being whether an action would have lain to recover the original debt at the date of the petition or of the hearing. Here no such action would have lain, for a plea of judgment recovered is a plea in bar and not merely a plea in abatement: *King* v. *Hoare* (4); and there is here on the face of the petition an allegation of a judgment, which has not only changed the original debt, but has extinguished it: *Florence* v. *Jenings.* (5)

[VAUGHAN WILLIAMS, J. That is not a decision that the original debt had ceased to be due.]

The decision of Lord Eldon, in *Ex parte Charles* (6), shews that the debt created by the judgment is a different debt from that which existed before. The petitioning creditor is bound by the debt which he alleges in his petition, and if he alleges a debt which is neither due nor recoverable, he cannot have a receiving order; in the present case the petitioning creditor must petition on the judgment.

[VAUGHAN WILLIAMS, J. If you are right, the decision of the Lords Justices, in *Ex parte Griffiths, In re Mostyn* (7), seems unintelligible.]

The effect of s. 7, sub-s. 2 (8), of the Bankruptcy Act, 1883, is that the petitioning creditor's debt must be in all respects

(1) Law Rep. 6 Ch. 546.
(2) 48 L. J. (Bank.) 43.
(3) Law Rep. 13 Eq. 309.
(4) 13 M. & W. 494.
(5) 2 C. B. (N.S.) 454.
(6) 16 Ves. 256.
(7) 3 D. M. & G. 174.
(8) By s. 7, sub-s. 1, of the Bankruptcy Act, 1883, "A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf, having knowledge of the facts, and served in the prescribed manner."

By sub-s. 2, "At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition."

the same at the date of the hearing of the petition, when he makes his affidavit of verification, as it was at the date of the act of bankruptcy, and to that extent operates to alter the old law that the debt, though merged in a judgment, would nevertheless support a bankruptcy petition.

The affidavit verifies only the debt on the judgment, and not the whole debt mentioned in the petition.

Yate Lee, for the petitioning creditor. Although the original debt is extinguished for certain purposes, it is not extinguished for all, and particularly for the purpose of bankruptcy proceedings: *Bryant* v. *Withers*. (1) It follows from that decision that the original debt and the judgment debt are the same for the purposes of bankruptcy, and that the petition may be founded either on the judgment or on the original debt. The petitioning creditor cannot be put in the dilemma that either there was no judgment at the date of the act of bankruptcy or that the judgment has extinguished the original debt. If both debts are the same for bankruptcy purposes, there is nothing in the Act of 1883 to alter the rule laid down by Lord Ellenborough in *Bryant* v. *Withers*. (1)

VAUGHAN WILLIAMS, J. I am of opinion that this appeal should be dismissed. It is contended that the petitioning creditor's debt is a judgment debt, and that the effect of the judgment is that the original debt has been extinguished and has ceased to exist. I do not agree with that contention, and I think that the judgment has not extinguished the debt for bankruptcy purposes or for the purpose of supporting a bankruptcy petition. The authorities prior to the Act of 1883 seem to be conclusive against the contention of the debtors. It has been further urged that an alteration in the law has been effected by the Act of 1883, but I have entirely failed to discover what that alteration is.

Upon the question whether the judgment has operated to extinguish the original debt for bankruptcy purposes or for the purpose of supporting a petition in bankruptcy the case of *Ex parte Griffiths, In re Mostyn* (2), is absolutely conclusive. The

(1) 2 M. & S. 123. (2) 3 D. M. & G. 174.

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language of Knight Bruce, L.J., is clear and unambiguous: "a bond, in the case of a simple contract, or a judgment, in the case of a specialty, which for many cases extinguishes (though not satisfying) the original debt, does not do so as against the creditor for the purpose of disabling him from making his debtor a bankrupt on the original debt, remaining in every sense or in every other sense unsatisfied." But this is by no means the only authority on the point; there is authority at law as well as in equity, and in *Bryant* v. *Withers* (1) the judgment of Lord Ellenborough is entirely to the same effect. It is now sought to get rid of these authorities by saying that the law has been changed; but that seems not to be the case, and I do not understand the distinction which is attempted to be drawn. It is said that, although the authorities may establish the proposition that the debt has not been extinguished for bankruptcy purposes, the proceedings are not right in the present case. They seem to me to be perfectly right. In *Ex parte Griffiths, In re Mostyn* (2), the petitioning creditor's debt was alleged to be a debt on a judgment, and the objection taken was the converse of that taken in the present case; it was there said that the petition ought to have been founded on the original debt; here it is contended that it ought to be founded on the judgment. I do not think it is material which course is adopted, though in cases where the judgment has not been obtained at the date of the act of bankruptcy, I think it preferable that the bankruptcy petition should be founded on the original debt. Then it is said that the affidavit only verifies the judgment; but reading it together with the petition it is plain that it verifies both debts. The petitioning creditor is in my opinion entitled to refer in his affidavit to the judgment as being primâ facie conclusive evidence of his debt. The only other case to which I need refer is *Ex parte Charles* (3), in which it is said that the judgment of Lord Eldon is to a contrary effect. But that does not seem to be so: in that case the petitioning creditor's debt was based on a verdict for damages in an action for breach of promise of marriage, the commission in bankruptcy having issued, as was assumed, before

(1) 2 M. & S. 123. (2) 3 D. M. & G. 174.
(3) 16 Ves. 256.

judgment was signed in the action. (1) On that state of facts Lord Eldon held that the verdict was not such a liquidation of the damages as would support the petition. That decision is in no way an authority in favour of the debtors in the present case. The appeal must therefore be dismissed.

KENNEDY, J. I am of the same opinion. For certain purposes no doubt a debt is extinguished in a judgment, and it has always been the rule at common law that a debt or damages is extinguished in a remedy of a higher nature. But one of those purposes for which the debt is extinguished is not the making it the foundation of bankruptcy proceedings. There is clear and apparently uncontradicted authority that the judgment is no bar to the enforcement in bankruptcy by creditors of their rights upon a debt existing before the judgment. There are good reasons why at common law the recovery of a judgment should afford a perfectly good defence or plea in bar, for the Court has already given by the judgment the relief sought by the plaintiff, and entirely fresh proceedings on his part could only result in his obtaining another judgment; this was pointed out by Tindal, C.J., in *Smith* v. *Nicolls* (2), and is consistent with common sense. But the same rule has never been held to apply to bankruptcy proceedings; a judgment is primâ facie conclusive evidence of the existence of the debt upon which it is founded, and its existence is no bar to the creditor's obtaining his rights on the debt which existed before the judgment.

Appeal dismissed; leave to appeal refused.

Solicitors for debtors: *T. A. Dennison & Co., for Plant, Dudley.*
Solicitor for petitioning creditor: *W. Webb, for R. M. & J. M. Kerr, Halifax.*

(1) This assumed state of facts was erroneous: see note at 16 Ves. 256.
(2) 5 Bing. N. C. 208.

W. J. B.

1894
Dec. 15.

IN RE MAUND. EX PARTE MAUND.

Bankruptcy—Petition—Amendment—Adding Petitioning Creditors—Time within which Creditors may be added—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 105.

The Court will not amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy upon which the petition is founded, creditors whose debts are other than those in respect of which the petition was presented.

APPEAL from a decision of the registrar of the Tredegar County Court allowing an amendment of a petition in bankruptcy.

On March 5, 1894, the debtor executed a deed of assignment for the benefit of creditors. On May 16 a bankruptcy petition, founded on the act of bankruptcy of March 5, was presented against the debtor by four non-assenting creditors, the aggregate amount of whose debts was 256*l.* (1)

On June 6 notice to dispute the petition was given on the ground that two of the petitioning creditors' debts were subject to reduction. The hearing of the petition was adjourned until June 15, when a short notice of motion was given by the official receiver to amend the petition by adding the names of two other persons as petitioning creditors. The registrar made the amendment asked for, and the debtor now appealed against his decision.

J. Corner, for the debtor. The registrar had no power to amend the petition by adding persons as petitioning creditors who could not, at the time the amendment was made, have themselves presented a petition because more than three months had elapsed since the committal of the act of bankruptcy. The

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

"(*a*) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to 50*l.*, and

"(*c*) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition."

requirement of s. 6 (*c*) of the Bankruptcy Act, 1883, cannot be dispensed with by making such an amendment.

Muir Mackenzie, for the respondent. The registrar had power to make the amendment under s. 105 of the Bankruptcy Act, 1883, which provides that "the Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as the Court may think fit to impose." The power is given in as wide terms as possible; there is no limitation in respect of time or otherwise, and to construe the section as suggested would be to introduce a limitation not found in the Act. In the cases of *Ex parte Owen, In re Owen* (1), *Ex parte Dearle, In re Hastings* (2), and *Re Ellis, Ex parte Hinshelwood* (3), leave was given to amend the petition by adding fresh petitioning creditors after three months had elapsed from the date of the act of bankruptcy.

[VAUGHAN WILLIAMS, J. Those were cases in which the person joined was a cestui que trust or trustee. The joining of such persons, as was pointed out in *Ex parte Culley, In re Adams* (4), is a mere rule of bankruptcy. It does not follow that the statutory requirements with respect to who may be a petitioning creditor can be dispensed with.]

The cases, at any rate, shew that there is jurisdiction to add petitioning creditors after the three months; and, if that be established, the only remaining question is whether this was a proper case for the exercise of the registrar's discretion to allow the amendment. Sect. 107 enables the Court, where the petitioner does not proceed with due diligence, to substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by the Act in the case of the petitioning creditor. That section contemplates a different creditor and a different debt, without any limitation as to time, shewing the intention of the legislature to give the largest powers with respect to the introduction of fresh petitioning creditors. In *In re Maugham, Ex parte Maugham* (5), the Court refused an application made more than three months after the act of

(1) 13 Q. B. D. 113.
(2) 14 Q. B. D. 184.
(3) 4 Morr. 283.
(4) 9 Ch. D. 307.
(5) 21 Q. B. D. 21.

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bankruptcy—namely, the execution of a deed of assignment for the benefit of creditors—by non-assenting creditors to rescind an order dismissing the petition, and asking that their names might, under s. 107, be substituted for those of the original petitioning creditors. There, however, the petition had been dismissed, and the case is, therefore, different from the present.

VAUGHAN WILLIAMS, J. In my judgment, this order for the amendment of the petition ought not to have been made. The petition was presented by several petitioners, the aggregate of whose debts was alleged to come up to the statutory amount. It appears that the debtor did not give any notice questioning the allegations of the petition until June 6 in the present year. Subsequently, in consequence, no doubt, of the objection, which seems to have been well founded, that some of the alleged debts had no existence in fact, an application was made to amend the petition by adding a fresh petitioner or fresh petitioners. At the time when that application was made more than three months had elapsed from the date of the committal of the act of bankruptcy on which the petition was founded—namely, the assignment for the benefit of creditors mentioned in the petition, that assignment having been made on March 5. The question we have to decide is whether, upon these facts, the registrar's order ought to have been made. It was argued on behalf of the petitioners that the amendment was authorized by s. 105, sub-s. 3, of the Bankruptcy Act, 1883, which enacts that, "the Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose." It was argued that there is no limitation fixed of the time within which that power of amendment may be exercised; that the power is unlimited, and that, if we were to hold that it was limited in any way, we should be introducing words into sub-s. 3 which have not been put there by the legislature. For myself, if it were necessary to decide this case on the question of jurisdiction, I should have no hesitation in saying that the sub-section can give the Court no power to make a person a petitioning creditor on any other ground than is prescribed by the Act itself. One is familiar with this sort of argument that the Court

will be introducing words to limit the general powers given by the Act; but the plain answer is that it does not signify whether you deal with this sort of question as matter of theoretical jurisdiction or as matter of judicial discretion. It is perfectly clear that the Court ought not to allow, after three months have elapsed from the date of the committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors, who could not themselves present a petition, and the introduction of a debt which, after the same period has elapsed, would not be a debt upon which a petition could be founded. It was admitted that if the persons sought to be introduced in the present case had had debts of the necessary amount they could not of themselves have presented a petition after the three months. It was said, however, that we ought to allow the amendment here, although, if the case were one in which the debt of the petitioning creditor who was introduced exceeded 50*l.*, the result might be that all the original petitioning creditors would fail to establish their right to petition, and the petition would succeed only by reason of the introduction of a creditor who, by himself, could not have succeeded in establishing his right to petition. Our attention was called to several cases which, it was said, established that the power of amendment could be exercised after the three months had elapsed. In all those cases, however, it will be seen that the person added was not essential to the petition by virtue of the requirement of the Act, but only by virtue of the rules of practice of the Bankruptcy Court. That is the explanation of the addition of the cestui que trust in *Ex parte Dearle, In re Hastings.* (1) In *Ex parte Owen, In re Owen* (2), the actual amendment was not made; it was only suggested that it might be made. In that case, also, you had a petition by a person who had a right to enforce the debt, and the addition of the trustee in liquidation was only a matter of practice. In *In re Maugham, Ex parte Maugham* (3), a somewhat similar question to this was raised under s. 107, which provides that "where the petitioner does not proceed with due diligence on his petition the Court may substitute as petitioner any other creditor

(1) 14 Q. B. D. 184. (2) 13 Q. B. D. 113.
(3) 21 Q. B. D. 21.

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to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor." It is true that in that case, at the time of the application to substitute new names for the names of the original petitioning creditors, the petition had been dismissed; but it is perfectly plain from Cave, J.'s, judgment that he was of opinion that the power ought not to be exercised after the lapse of three months from the date of the act of bankruptcy. I am of opinion that the order of the registrar was wrong, and the amendment ought not to have been made.

WRIGHT, J. I am of the same opinion. As I understand the matter, every debt sought to be added, as ground of the petition, after three months from the date of the act of bankruptcy, is unavailable for that purpose; but if within that period a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice.

Appeal allowed.

Solicitors for appellant: *Bridges, Sawtell, Heywood, Ram, & Dibdin, for B. E. Hodgens, Abergavenny.*

Solicitors for respondent: *A. R. & H. Steele, for Gabb & Walford, Abergavenny.*

W. A.

FENNA *v.* CLARE & CO.

1894
Dec. 12.

Nuisance—Injury—Absence of Direct Evidence as to Cause of—Contributory Negligence—Burden of Proof.

The defendants were the owners of a low wall, eighteen inches high, immediately abutting upon a public highway. On the top of the wall was a row of sharp spikes which, as the jury found, was a nuisance to the highway. The plaintiff, a little girl, was found standing on the highway by the wall with her arm bleeding from a wound, such as might have been caused by her falling upon the spikes. No person witnessed the accident. The plaintiff sued the defendants for damages for the injury sustained. At the trial the plaintiff was not called as a witness, nor was any other evidence than the above given as to how the accident happened, except that of a witness who shortly before the accident saw the plaintiff climbing up upon the wall and told her to get down, which she did:—

Held, that there was evidence to go to the jury that the nuisance was the cause of the plaintiff's injury.

APPEAL from county court of Cheshire.

The defendants were the owners of a shop adjoining a public highway. In front of a receding window of the shop, and immediately abutting on the footway, was a low wall eighteen inches high, the property of the defendants, on the top of which wall was a row of sharp iron spikes four and a half inches high. On May 21, 1894, the plaintiff, a little girl aged five years and nine months, was found standing on the footpath by the side of the wall with her arm bleeding from a recent wound, such as might have been caused by her falling upon the spikes. No person witnessed the accident. The plaintiff brought an action in the county court for damages for the injury, which was alleged to have been caused by reason of the defendants having maintained a state of things which was a nuisance to the highway. At the trial the plaintiff, who was ill, was not called as a witness, nor was any other evidence than the above given as to how the accident happened, except that of the defendants' shop-boy, who deposed that shortly before the accident he saw the plaintiff climbing up upon the wall between the spikes and told her to get down, which she did.

The defendants' counsel submitted, upon the authority of

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Wakelin v. *London and South Western Ry. Co.* (1), that there was no case to go to the jury; for that, assuming that the spiked wall was a nuisance, and that the plaintiff's injury was caused by her falling upon the spikes, the facts proved were as much consistent with her having so fallen whilst wrongfully climbing upon the wall—in which case she would, upon the authority of *Hughes* v. *Macfie* (2), be disentitled to recover—as with her having fallen whilst lawfully using the highway. The county court judge, however, refused to nonsuit, and left to the jury the following questions:—1. Were the spikes a nuisance? Answer:—Yes. 2. Was the injury caused by the spikes?—Answer: Yes. 3. Was there contributory negligence on the part of the plaintiff?—Answer: No. Upon those findings the judge entered judgment for the plaintiff. The defendants appealed.

A. P. Thomas, for the defendants. The onus lay upon the plaintiff to shew that the existence of the nuisance was the cause of the injury, and of that she gave no evidence. There is no evidence that she was lawfully using the footpath, and "if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails" (per Lord Halsbury in *Wakelin* v. *London and South Western Ry. Co.* (3)). That case is on all-fours with the present. There the plaintiff's husband was knocked down and killed by a passing train at a point where the railway line crossed a public footpath on the level. The House of Lords held that, in the absence of evidence that the accident was caused by the negligence of the defendants rather than by the negligence of the deceased, there was no case to go to the jury.

[POLLOCK, B. But here there is this distinction, that you start with the established fact that the defendants were guilty of a nuisance which might have caused the injury. As against such wrongdoers, it is not an unreasonable inference that it did in fact so cause it.]

But in *Wakelin's Case* (1) the Lords assumed for the purposes

(1) 12 App. Cas. 41. (2) 2 H. & C. 744.
(3) 12 App. Cas. 41, at p. 45.

of argument that the defendants were guilty of negligence which might have caused the accident. Therefore in that case the defendants were just as much wrongdoers as were the defendants here. In each case the question was whether the defendants' wrongdoing was causally connected with the injury.

In *Wakelin's Case* (1) Lord Halsbury (at p. 46) pointed out that there is "no legal presumption that people are careful and look before them on crossing a railway." So here there is no legal presumption that the plaintiff was lawfully using the highway. Indeed, having regard to the evidence of the defendants' shop-boy, the presumption of fact is rather the other way. The only means by which the defendants could have established their case was by cross-examination of the plaintiff; but she kept out of the box. In the absence of her evidence there was nothing left but mere conjecture, which is not enough.

Broadbridge, for the plaintiff, was not called upon.

POLLOCK, B. No doubt in these cases strict proof of the defendants' liability ought, in general, to be given. But here the facts are very special. The defendants maintained, at a spot immediately abutting on a public highway, a spiked wall which the jury have found to be a nuisance. Then a child is found on the highway close to the wall, with her arm injured, and injured in such a way as is consistent with the injury having been caused by her stumbling against the spikes whilst lawfully passing along the footpath. In my judgment, it cannot be said that there was no evidence on which the jury might have found that the injury was caused by the nuisance whilst the plaintiff was using the highway in a proper manner.

GRANTHAM, J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *Frith Needham, for Danger & Son, Liverpool.*

Solicitors for defendants: *Clare & Higgins, Liverpool.*

(1) 12 App. Cas. 41.

J. F. C.

C. A.
1894
Nov. 21, 22.

[IN THE COURT OF APPEAL.]

TYRRELL *v.* PAINTON.

Practice—Equitable Execution—Appointment of Receiver—Equitable Reversionary Interest in Personal Estate—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Court has jurisdiction to appoint, by way of equitable execution, a receiver of an equitable reversionary interest in personal estate.

Fuggle v. *Bland* (11 Q. B. D. 711) followed.

APPEAL against the refusal of Lord Russell of Killowen, C.J., as vacation judge, to make an order for the appointment of a receiver of certain property belonging to John Painton, one of the defendants.

On April 27, 1894, an order was made by the President of the Probate Division that the defendants should, within seven days from the service of the order upon them, pay to the plaintiff the sum of 213*l.* 14*s.* 10*d.*, the amount of his taxed costs of the action. The order was duly served on the defendants, but it was not obeyed.

The defendant John Painton was entitled to a reversionary interest, under the will of Joseph Painton, who died on August 14, 1869. By his will, dated December 22, 1868, the testator devised and bequeathed all his real estate and chattels real, and all his personal estate, to two trustees, upon trust with all convenient speed after his decease to get in and convert into money all such part of his personal estate (except chattels real) as should not consist of money, and to invest the same and his other residuary moneys in manner therein mentioned, and during the life of the testator's wife to pay to her or permit her to receive the income thereof, and also the rents and profits of his real estate. And from and immediately after her decease the testator directed that the trustees for the time being of his will should forthwith sell his real estate and chattels real. And he declared that his trustees should stand possessed of the moneys to arise from the realization of his real estate and chattels real, and of all other his moneys and residuary personal estate, upon trust, in case

there should be issue of his marriage with his said wife, for the children of the marriage as therein mentioned, but, in case there should be no issue of the marriage, in trust for the defendant John Painton absolutely. The testator's wife survived him, but there was no issue of the marriage. The testator's real estate consisted of some copyhold premises. At the time when the application for the appointment of a receiver was made the testator's widow was still living, and she was in the receipt of the rents and profits of the copyhold premises.

The plaintiff, in his affidavit in support of the application, said: "I am informed and believe that the defendants have very little property (if any) which can be attached under a writ of fi. fa." Lord Russell, C.J., refused the application, because he thought that, upon the true construction of the will, the defendant took under it an interest in land which was held in trust for him, and that consequently, by virtue of 1 & 2 Vict. c. 110, s. 11, that interest could be taken under an elegit.

The plaintiff appealed.

The summons asked that the plaintiff might be appointed receiver of the "reversionary interest to which the defendant John Painton is entitled under the will of Joseph Painton deceased" of and in the copyhold property, the description of which was given, "which said several premises form part of the residuary real estate of the said Joseph Painton deceased, for the purpose of realizing thereout the sum of 213*l.* 14*s.* 10*d.*," ordered to be paid by the defendants to the plaintiff.

Wheeler, *Q.C.*, and *W. H. Nash*, for the plaintiff. There is jurisdiction to appoint a receiver of such an interest as that which the debtor takes under the will, which is really an equitable reversionary interest in the proceeds of the sale of the real estate: *Fuggle* v. *Bland* (1), which was followed by Chitty, J., in *Westhead* v. *Riley*. (2) It is suggested that *Harris* v. *Beauchamp* (3) is an authority to the contrary; but *Fuggle* v. *Bland* (1) was not cited there. *Fuggle* v. *Bland* (1) has never been questioned, and *Harris* v. *Beauchamp* (3) is

(1) 11 Q. B. D. 711. (2) 25 Ch. D. 413.
(3) [1894] 1 Q. B. 801.

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really in the plaintiff's favour. *Holmes* v. *Millage* (1) does not apply.

[LINDLEY, L.J. If, supposing the defendant's interest had been legal, it could have been taken under an elegit, it would seem to be a matter of course to appoint a receiver when the interest is only equitable: *Anglo-Italian Bank* v. *Davies*. (2) It is not necessary now to commence a fresh action for the appointment of a receiver, as it would have been under the old practice.]

The language used by Davey, L.J., in *Harris* v. *Beauchamp* (3) points to a still wider interpretation of the jurisdiction of the Court.

[LORD HALSBURY. In *Harris* v. *Beauchamp* (3) it was alleged that there had been fraud in dealing with the debtor's assets; no such case is raised here.]

Carrington, for the defendant. Under the will an interest in land is held in trust for the defendant within the meaning of s. 11 of 1 & 2 Vict. c. 110. This interest can be taken under an elegit, and there is therefore no reason for appointing a receiver: Chitty's Practice (14th ed.), vol. 2, pp. 877, 878. In *Harris* v. *Beauchamp* (4) it was pointed out that the equitable jurisdiction under the Judicature Act does not exceed the old equitable jurisdiction of the Court of Chancery. Here it is not shewn that the defendant has not other property which can be reached by an elegit.

[LORD HALSBURY. The order which had been made in *Harris* v. *Beauchamp* (3) was not intended as execution, but for the purpose of preserving the property, and Davey, L.J., pointed out that there was no power to make such an order.]

The practice at chambers is not to appoint a receiver, if there is any property which can be taken under an elegit at law.

[LINDLEY, L.J., referred to *Neate* v. *Duke of Marlborough* (5).]

In *Fuggle* v. *Bland* (6) the debtor did not appear. The order was made ex parte by a Divisional Court, and the decision does

(1) [1893] 1 Q. B. 551.
(2) 9 Ch. D. 275.
(3) [1894] 1 Q. B. 801.
(4) [1894] 1 Q. B. at p. 808.
(5) 3 My. & Cr. 407.
(6) 11 Q. B. D. 711.

not bind this Court. It is contrary to the principle of *Harris* v. *Beauchamp*. (1)

Wheeler, Q.C., in reply, referred to *Doe* v. *Greenhill*. (2)

Cur. adv. vult.

Nov. 22. LORD HALSBURY. It appears to us tolerably certain that Lord Russell, C.J., refused the application for the appointment of a receiver because he was under the impression that according to the practice an elegit could be issued to take the defendant's interest under the will, it being an interest in land held in trust for him. We think that is not so, but that the defendant's interest under the will is an equitable reversionary interest in personalty, not an interest in land. Such an interest cannot be taken under an elegit, and the authorities establish that the relief which is asked for is the proper remedy when an elegit cannot be issued. We think, therefore, that the order of Lord Russell, C.J., must be reversed, and an order made for the appointment of a receiver.

LINDLEY, L.J. I am of the same opinion. The difficulty has arisen from the form of the will. But, after carefully considering its provisions, I cannot see that any interest in land is held on trust for the defendant within the meaning of s. 11 of 1 & 2 Vict. c. 110. His interest is an equitable reversionary interest in a sum of money—the proceeds of the sale of the land—and such an interest cannot be got at by means of an elegit, or in any other way than by the appointment of a receiver. I have looked at the authorities, and I cannot find that the Court of Chancery has ever appointed a receiver of an equitable reversionary interest. There is this difficulty, that during the life of the tenant for life there would be nothing for the receiver to receive. But I do not think this is a fatal objection, and I think that, if it had been shewn that a tenant for life was in extremis, the Court of Chancery would have appointed a receiver of an equitable reversionary interest. I think there is jurisdiction to do so.

(1) [1894] 1 Q. B. 801.

(2) 4 B. & A. 634.

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Lindley, L.J.

In *Fuggle* v. *Bland* (1) such an order was made, and I can see no reason why we should not follow it. The order should appoint the plaintiff receiver of the defendant's equitable reversionary interest in the proceeds of the sale of the copyholds. The summons is wrong in form, because it asks for the appointment of a receiver of the defendant's reversionary interest in the copyholds themselves. The appointment of a receiver does not create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale, and may possibly be useful.

A. L. SMITH, L.J. I am of the same opinion.

Appeal allowed.

Solicitors: *Wood, Bigg, & Nash, for A. G. Haines, Farringdon; Tarry & Sherlock.*

(1) 11 Q. B. D. 711.

W. L. C.

BIGGS AND ANOTHER *v.* DAGNALL. 1894 Dec. 17.

Practice—Pauper—Appeal in Formâ Pauperis—Special Leave—Security for Costs.

A party who has sued or defended in formâ pauperis in the Court below is entitled to appeal as a pauper without either giving security for costs or obtaining special leave so to appeal.

APPEAL from county court of Shoreditch.

On September 6, 1894, the plaintiffs commenced the action in the Chancery Division of the High Court. On September 12 the defendant obtained an order giving him leave to defend the action in formâ pauperis. On September 26 an order was made remitting the action to the Shoreditch County Court. The action was tried in the county court, and judgment was given for the plaintiffs. The defendant gave notice of appeal to the Divisional Court. The plaintiffs thereupon applied to the Divisional Court that the defendant might be ordered to give security for the costs of the appeal.

Scarlett, for the plaintiffs. The defendant is bound either to give security for costs, or else to apply for special leave to appeal in formâ pauperis. By Order LIX., r. 17, the rules regulating appeals to the Court of Appeal are to apply to appeals to the Divisional Court; and by Order LVIII., r. 15, which deals with appeals to the Court of Appeal, security for the costs of such an appeal may be ordered under special circumstances. But the poverty of the appellant has always been regarded as a special circumstance within the meaning of that rule. By obtaining leave to defend the action as a pauper, the defendant shewed that he has not the means to pay the costs of the appeal if unsuccessful. If he does not give security he ought, at all events, to get fresh leave to appeal as a pauper. The original leave to defend as a pauper was obtained on an opinion of counsel that he had a fair primâ facie case. But the effect of that opinion is displaced by the judgment which has been obtained against him. In *In re Roberts* (1) the Court of Appeal granted special

(1) 33 Ch. D. 265.

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leave to appeal as a pauper, and held that an application for such leave must be governed by the same rules as an original application for leave to defend as a pauper.

F. W. Gilks, for the defendant. In *Drennan* v. *Andrew* (1), Lord Cranworth, L.C., held, that when a party has obtained the common order to sue in formâ pauperis at any stage of the suit it will carry him through all subsequent stages, and no special order is required to enable him to appeal without payment of a deposit. *In re Roberts* (2) is distinguishable upon the ground that there the appellant did not originally sue as a pauper.

WILLS, J. We cannot accede to this application. The case of *Drennan* v. *Andrew* (1) seems a direct authority against it, and, if the practice is to be varied, we must leave it to the Court of Appeal to vary it. In *In re Roberts* (2), as also in *Clements* v. *London and North Western Ry. Co.* (3), no doubt the Court of Appeal entertained a special application for leave to appeal as a pauper; but that, as has been pointed out, was because no application to appear as a pauper had been made in the Court below.

WRIGHT, J. I am of the same opinion. I cannot think that the right of appealing in formâ pauperis can be made subject to the limitation of giving security for costs; for if it were, the practical result would be that a pauper could never appeal.

Application refused.

Solicitor for plaintiffs: *J. B. Roberts.*
Solicitor for defendant: *Pannell.*

(1) Law Rep. 1 Ch. 300. (2) 33 Ch. D. 265.
(3) [1894] 2 Q. B. 482.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 6.

GRAY *v.* BARTHOLOMEW.

Practice—Payment of Money into Court—Liability not denied in Defence—Verdict for Smaller Amount—Payment out of Court to Defendant—Power of Judge to make Order—Order XXII., *r.* 5.

Order XXII., r. 5, directs that, in case of payment into Court when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence; the money paid into Court shall be paid out to the plaintiff on his request, unless the Court or a judge shall otherwise order.

In an action for slander the defendant paid 5*l.* into Court. The plaintiff recovered a farthing damages, and judgment was entered for the defendant with costs. The judge directed that the money paid into Court, less one farthing, should be paid to the defendant. On appeal:—

Held, that the judge had power to make such an order.

APPEAL from an order of Hawkins, J., at the trial of the cause.

The action was for slander. The defendant paid 5*l.* into Court in satisfaction of the cause of action. The plaintiff did not accept the money paid in in satisfaction, but proceeded to trial. The jury found a verdict for the plaintiff with one farthing damages. The learned judge gave judgment for the defendant with costs, and ordered that the money paid in, less one farthing, should be paid out to the defendant.

The plaintiff appealed.

W. H. Nash, for the plaintiff. The case comes within Order XXII., r. 5 (*b*), which directs that "when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence; the money paid into Court shall be paid out to the plaintiff on his request . . . unless the Court or a judge shall otherwise order." This rule does not authorize the judge to deprive the plaintiff of the money, which directly it is paid in becomes his property. All that can be done under the rule is to restrain the payment to the plaintiff, if any reason is shewn for that course being taken. For instance, the money might be retained in Court as a security for so much of the defendant's costs should he succeed, but no order can be made

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which will prevent the money being credited in some way to the plaintiff. The old practice in cases where money has been paid into Court without denial of the defendant's liability is not altered by Order XXII.: *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (1)

J. St. L. Leslie, for the defendant. Order XXII., r. 5, gives the judge power to "otherwise order"—that is, to order that the money shall not be paid to the plaintiff—and that is the effect of the order in this case. In *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (1) the payment was under 6 & 7 Vict. c. 96, s. 2, as amended by 8 & 9 Vict. c. 75, s. 2, and not under the Rules.

W. H. Nash, in reply.

LORD ESHER, M.R. I do not wish to say anything about the decision of Wills, J., that has been referred to, except that I do not think I agree with it, though it is not necessary to determine the point, as this case turns on Order XXII. of the Rules. Under rule 5 of that Order, where money is paid into Court without a denial of liability, it may be paid out to the plaintiff on his request. Such a payment was made in this case, and the plaintiff would be entitled to ask that the money should be paid to him, but for the limitation in the rule, "unless the Court or a judge otherwise order." The meaning of that is that the Court or a judge may order that it shall not be paid to the plaintiff. To whom, then, is it to be paid? It must be paid either to the plaintiff or to the defendant, and if it is not to be paid to the one, it must ex necessitate rei be paid to the other. It seems to me that Order XXII., r. 5, was passed for the express purpose of giving the judge, in certain cases, power to deal with money paid in by the defendant, and that it gave jurisdiction to the judge in this case to make the order appealed against.

LOPES, L.J. I am of the same opinion. The case of *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (1) is distinguishable from the present case, because there the action was in respect of a libel published in a newspaper, as to which the plea was

(1) See note at end of case.

that it was inserted in the newspaper without actual malice and without gross negligence, and that a full apology had been inserted in the newspaper, and 50*l.* was paid into Court by way of amends. The learned judge held that the plaintiff was entitled to the money so paid in, though the jury had only given a farthing damages. (1) Whether that decision can be supported is not the question now before us, for the judgment was not founded on the Rules, but on the effect of payment into Court under the statute 6 & 7 Vict. c. 96, s. 2. Here we have to consider the effect of Order XXII., r. 5, in an action for slander, in which 5*l.* has been paid into Court in full satisfaction of the claim. The answer of the plaintiff was that the money paid in was not enough; but the jury have found for the plaintiff for a farthing damages only. On that finding judgment has been given for the defendant, and an order made that the money should be paid out to him. It is said that there is no jurisdiction to make such an order; but with that contention I do not agree. It seems to me that the meaning of Order XXII., r. 5, is that in a case within the rule the judge or a Court should have power to direct that the money in Court should not be paid out to the plaintiff. If such an order is made it follows, as the Master of the Rolls has pointed out, that, as the money was originally the defendant's, it must be paid out to him.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff: *H. Percy Becher.*

Solicitors for the defendant: *Ranger, Burton & Co.*

A. M.

(1) March 2, 1894.

DUNN *v.* DEVON AND EXETER CONSTITUTIONAL NEWSPAPER COMPANY.

Defamation — Newspaper — Payment of Money into Court with Defence of Apology — Admission — Damages — 6 & 7 Vict. c. 96, s. 2—8 & 9 Vict. c. 75, s. 2—Order XXII., r. 22.

Where in an action for a libel contained in a newspaper the defendant pleads an apology and payment of money into Court under 6 & 7 Vict. c. 96, s. 2, as amended by 8 & 9 Vict. c. 75, s. 2, and the plaintiff leaves the money in Court and proceeds to trial, if the jury find the plea to be proved the plaintiff is entitled as of right to the whole sum paid into Court, notwithstanding that the jury may have awarded him a less sum as damages. Order XXII., r. 22, which provides that neither the fact that money has been paid into Court, nor the amount

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paid in, shall be communicated to the jury, does not in any way affect the issues upon a plea under the above sections.

FURTHER CONSIDERATION before Wills, J.

The defendants were the proprietors of a newspaper called the *Devon and Exeter Gazette*, and the action was for a libel published by the defendants in that paper. The defendants pleaded an apology under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2, and paid 50*l.* into Court by way of amends, under the Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2. The plaintiff left the money in Court and proceeded to trial. The cause was tried at the Bristol Spring Assizes, 1894, when the jury found the plea proved, and awarded the plaintiff one farthing damages. The judge reserved for further consideration the question of the plaintiff's title to the 50*l.* in Court.

J. A. Foote (*C. W. Matthews*, with him), for the plaintiff. The plaintiff is entitled to the money in Court, and the judge has no discretion to order it to be paid out to the defendant. The money was paid into Court, not under the rules of the Judicature Act, but under the Libel Act, 1845, and Order XXII., r. 5, which gives the judge, in cases in which, money having been paid into Court under that Order, the jury find a verdict for the plaintiff for a less sum than the amount paid in, a discretion to order the balance to be paid out to the defendant, has no application. The privilege of paying money into Court in actions of libel was for the first time given in the Libel Act, 1843, which by s. 2 provided that in an action for a libel contained in a newspaper the defendant might plead that it was published without malice and without negligence, and that he afterwards published an apology, and upon filing such plea should be at liberty to pay into Court a sum of money by way of amends. Two years later the Libel Act, 1845, after reciting the above section, enacted by s. 2: "that it shall not be competent to any defendant in such action to file any such plea without at the same time making a payment of money into Court by way of amends, as provided by said Act, but every such plea so filed without payment of money into Court shall be deemed a nullity, and may be treated as such by the plaintiff in the action." That Act in effect re-enacted the power of paying money into Court given by the former Act, with the addition that the exercise of the power was made compulsory instead of permissive. Then came the Supreme Court Rules of 1875, under which power was given to pay money into Court in "any action," including actions for libel. But that general permission to pay money into Court in actions of libel generally did not impliedly repeal the Act of 1845, under which in a special class of libel actions it was made obligatory to pay money into Court as a condition of being allowed to plead an apology. The next step in the history of the legislation was that, by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), so much of s. 2 of the Libel Act, 1843, as gave the defendant liberty to pay money into Court was expressly repealed. But it was so repealed, not because the practice under the Libel Acts was superseded by that under the Judicature Act, so as to cause a payment into Court accompanying a plea of apology to be treated as a payment into Court under the Supreme Court Rules, but because the permission to pay money into

Court under the Act of 1843 was superseded by the obligation under the Act of 1845. By the same Act of 1879 the words "as provided by said Act" in s. 2 of the Libel Act, 1845, were repealed. But with that exception the Act of 1845 remains in force, and the practice under that Act still survives. But under that old practice, in the events which have happened, the plaintiff would have been absolutely entitled to the 50*l.* in Court. The only issue as to damages was whether the amount paid in was enough: see the old form of plea in Bullen and Leake, 3rd ed. p. 727; and upon that plea it was never competent for the jury to say that the amount paid in was too much. The present question could never have arisen prior to the making of the new rule —Order XXII., r. 22—which prohibits the communication to the jury of the fact that money has been paid into Court. But that rule does not alter the issue between the parties. The assessing of the damages at one farthing is merely another way of saying that 50*l.* is enough. The defendants will rely on *Lafone* v. *Smith* (4 H. & N. 158), and *Jones* v. *Mackie* (Law Rep. 3 Ex. 1), as authorities against the proposition that, where money has been paid into Court under the Libel Act, 1845, the plaintiff is entitled to a verdict for at least the amount paid in. But in those cases the jury found the apology to be insufficient, and consequently, the plea of apology and payment into Court being one entire plea, upon the defendants' failure to prove a part of it, the payment into Court became a nullity, and the defendants were entitled to have the money back. Here, however, the jury have found the plea proved.

Bucknill, *Q.C.*, and *Duke*, for the defendants. It is conceded that the money was paid into Court under the Libel Act, 1845, and not under the Supreme Court Rules. The plaintiff is not entitled to the 50*l.* unless he can shew that it became his money the moment it was paid in. But it did not at once become his money, for if it did he might have taken the money out of Court and gone on with the action for damages ultrà; and that, it was held in an Irish case of *Harris* v. *Arnott* (24 L. R. Ir. 404), he could not do. The plea of payment into Court under the Libel Act is nothing more than an offer to purchase peace; and if the offer is not accepted the defendant is entitled to have the money out again at once. This was evidently the view taken by Channell, B., in *Jones* v. *Mackie* (Law Rep. 3 Ex. at p. 3), where he says: "The defendant in effect says, 'I published this libel without malice or negligence, and if you will accept my apology I will give you 5*l.*' But he does not bind himself to give anything if his terms are not accepted. His admission of liability is conditional and not absolute."

WILLS, J. The uniform practice for the last fifty years, ever since the passing of Lord Campbell's Libel Act, down to the making of the new Rules of November, 1893, was simply to ask the jury whether the amount paid into Court was sufficient. They were not entitled to say that it was too much (except in cases in which the plea was not proved), for that question was not in issue. Now under the new rule—Order XXII., r. 22—the fact of the payment into Court is concealed from the jury. But the only object of that rule was to counteract the known tendency of juries to invariably give the plaintiff

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a little more than the sum paid in. It was never intended by that rule to alter the nature of the issues upon the plea. The plaintiff is therefore, notwithstanding the finding of the jury, entitled to the amount paid in. The order will be that the 50*l.* shall be carried to the plaintiff's credit, but remain in Court until after taxation, as security for the defendants' costs should they exceed the costs of the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Templeton & Cox, for Dunn & Linford Brown, Exeter.*

Solicitors for defendants: *Coode, Kingdon, & Cotton, for A. E. Ward, Exeter.*

J. F. C.

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Dec. 5, 6.

THE QUEEN *v.* JUSTICES OF LONDON.

Mandamus—Justices—Quarter Sessions—Appeal against Refusal of Licence—Jurisdiction as to Costs of Appeal—Judicial Function—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Summary Jurisdiction Acts*, 1848, 1879, 1884 (11 *&* 12 *Vict. c.* 43, *s.* 27; 42 *&* 43 *Vict. c.* 49, *ss.* 31, 55; 47 *&* 48 *Vict. c.* 43, *s.* 6)—*Quarter Sessions Act*, 1849 (12 *&* 13 *Vict. c.* 45), *ss.* 5, 6.

By the Alehouse Act, 1828, s. 29, where an appeal from an order of any justice under that Act is dismissed, "it shall be lawful for the Court to whom such appeal shall have been made . . . . and such Court is hereby required to adjudge and order" that the appellants shall pay costs to the justice.

By the Summary Jurisdiction Acts, 1848, 1879, and 1884, and the Quarter Sessions Act, 1849, other provisions are made relating to costs of appeals, and all Acts inconsistent with the Summary Jurisdiction Act, 1879, are repealed.

An appeal against the refusal of an application for a licence under the Alehouse Act, 1828, was dismissed by quarter sessions; but the Court refused to order the appellant to pay the costs of the respondent justices.

On an application for a mandamus commanding the justices in quarter sessions to hear and determine the application for an order for payment of costs:—

Held, that, in deciding that the statutes gave a discretion as to costs, and in refusing costs, the justices in quarter sessions were exercising a judicial, and not a ministerial, function, and their determination could not be reviewed by mandamus.

AN order nisi had been obtained calling on the justices of the county of London to shew cause why a writ of mandamus should not issue, commanding them to hear and determine according to law, and pursuant to the statutes in that behalf, the matter of an application by the justices acting for the Tower Division of the county of London, who were respondents in an appeal to quarter sessions by Frederick John Magerkorth, for an order

adjudging that Magerkorth, the appellant, should pay to the justices of the Tower Division such sum by way of indemnity for costs and charges of the appeal as the court of quarter sessions might think fit.

The facts, as stated on affidavit, were as follows.

At the general annual licensing meeting the occupier and licensee of a public-house applied to the justices of the Tower Division for the renewal of a licence to sell exciseable liquors by retail to be consumed on the premises. The justices refused to grant a renewal of the licence, and Magerkorth, as freeholder of the public-house, appealed to quarter sessions against such refusal. The appeal was dismissed, and an application was made to the court of quarter sessions to order that the appellant should pay to the respondent justices such sum by way of costs as should, in the opinion of the Court, be sufficient to indemnify the justices from all costs and charges to which they had been put in consequence of the appeal; but the Court refused to order the appellant to pay any costs. (1)

Poland, Q.C., and *Danckwerts*, for the justices of the county of London, shewed cause. The justices at quarter sessions have heard and determined the case, and cannot be set right by mandamus on a point of law such as this, even if they have determined it wrongly. In *Reg.* v. *Justices of Middlesex* (2) a rule for a mandamus was discharged, because there had been a hearing and determination on the merits; the same reason

(1) By the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 29, "In every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the Court to whom such appeal shall have been made or intended to be made, and such Court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal";—with power to commit to prison until payment.

(2) 2 Q. B. D. 516.

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applies here. In *Reg.* v. *Justices of West Riding of Yorkshire* (1), and *Rex* v. *Justices of the City of York* (2), the words of the statutes were different. *Reg.* v. *Justices of Monmouthshire* (3) was decided by a single judge, and the point was not the same as in this case. Here the justices have a discretion as to costs. The provisions of 9 Geo. 4, c. 61, s. 29, are repealed, or at least superseded, by subsequent legislation: 11 & 12 Vict. c. 43, s. 27; 12 & 13 Vict. c. 45, ss. 5, 6; 42 & 43 Vict. c. 49, ss. 31, 55; 47 & 48 Vict. c. 43, s. 6. The licensing justices are a "court of summary jurisdiction," and therefore these Acts apply: *Reg.* v. *Justices of Glamorganshire.* (4) The justices ought not to be directed to make an order which they think unjust.

Jelf, Q.C., and *D'Eyncourt*, (*Avory*, with them), for the justices of the Tower Division; and

Marshall Hall, for the appellant Magerkorth, in support of the order nisi.

Sect. 29 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), has never been repealed, and the words, "such Court is hereby required," are imperative. It is clear, therefore, that the justices are called upon to do a purely ministerial act, and mandamus will lie. *Reg.* v. *Justices of Monmouthshire* (3) is distinctly in point. The justices cannot find the facts so as to give themselves jurisdiction. This distinguishes the case from those referred to in opposition to the application. The matters dealt with by 9 Geo. 4, c. 61, have formed the subject of subsequent legislation, and if it had been intended to repeal s. 29 this would have been done by express enactment.

[The following authorities were also referred to: *Reg.* v. *Justices of Middlesex* (5); *Reg.* v. *Bolton* (6); *Reg.* v. *Hellier* (7); *Reg.* v. *Mayor, &c., of Bolton* (8); *Reg.* v. *Justices of Glamorganshire.* (9)]

POLLOCK, B. The question raised in this case is one of very general importance, and I have looked into the authorities on

(1) 2 B. & S. 811.
(2) 1 A. & E. 828.
(3) 1 D. & L. 145.
(4) [1892] 1 Q. B. 621.
(5) 9 A. & E. 540.
(6) 1 Q. B. 66.
(7) 17 Q. B. 229.
(8) Law Rep. 5 Q. B. 251.
(9) 22 Q. B. D. 628.

the point in order to endeavour to ascertain the principle on which it ought to be decided. In the first place, it is admitted that the applicants cannot succeed if they are asking for a mandamus in order to get the opinion of the Court, by way of appeal, on the question which the justices have decided. On the other hand, if the justices decline to deal with any matter, on the erroneous assumption that they have no jurisdiction to deal with it, the Court has power to grant a mandamus. Also, if there is any preliminary objection to their jurisdiction, and they wrongly decline to consider such objection, the Court may come to the conclusion that the justices have taken upon themselves to deal with a matter which they have no power to deal with, and may interfere by mandamus. But where the justices, sitting as a judicial tribunal, have heard counsel on both sides of the question, and given their decision, the Court will not interfere. No doubt where an inferior tribunal has to do that which is merely a ministerial act, and has no discretion to refuse to do such act, this Court may grant a mandamus. The case of *Rex* v. *Justices of the City of York* (1) illustrates this principle. There a local Act of Parliament provided that, in the event of a greater amount of compensation than had been offered being awarded by a jury, the costs of the inquest, &c., to be settled by a justice, should be borne by certain trustees. In that case the statute imposed a duty upon the justices to do what was a purely ministerial act, namely, to settle the costs which the Act of Parliament itself declared should be borne by the trustees, and it is clear that in the case of a purely ministerial office a mandamus may be granted; but the granting of costs cannot be said to be a merely ministerial act, if there is any discretion, for in such a case the exercise of a judicial function is involved. In *Ex parte Cook* (2) a rule for a mandamus to the commissioner of the Court for the Relief of Insolvent Debtors was refused, on the ground that he had a judicial discretion whether or not to make the order. In giving judgment, Cockburn, C.J., said: "We do not say that the commissioner might not have exercised a sounder discretion if he had acted in accordance with that decree; but, if he thought it erroneous, he had a right, of which

(1) 1 A. & E. 828.

(2) 2 E. & E. 586.

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we cannot deprive him, to exercise his judicial functions, and act upon his own opinion. The Court of Chancery has no power to dictate to him what his decision shall be; nor does this Court, on application to it for a mandamus to a Court having a judicial discretion, ever do more than direct the Court to hear and determine the case; we never say how the case is to be decided. In granting the mandamus which is now asked for, we should be departing from that long and well-established principle." Wightman, J., also said: "The only question is, whether the functions of the Insolvent Commissioner are judicial or ministerial." In the case of *Reg.* v. *Richards* (1), where the judge of a county court, upon an interpleader summons, erroneously decided against a claimant, on the ground that the notice of claim was insufficient, the Court issued a mandamus to him to adjudicate upon the claim. In giving judgment in that case Coleridge, J., said: "There is a well-known principle upon which this Court interferes with the decisions of inferior courts. If the latter abstain from exercising their jurisdiction, and refuse to hear a matter upon the ground that a preliminary proceeding has not been taken, this Court will interfere to set them right." What are the facts in the present case? The old Act, 9 Geo. 4, c. 61, no doubt required that costs should be given; but the subsequent statutes which have been referred to in argument have modified that provision, by giving the justices a discretion, and here they have decided that they will not give costs. This is sufficient to distinguish the present case from *Reg.* v. *Justices of West Riding of Yorkshire* (2), where the words of the Act were "authorized and required to award." The other case relied on in support of the application, *Reg.* v. *Justices of Monmouthshire* (3), was the decision of a single judge sitting in the Bail Court. I am clearly of opinion that the mandamus ought not to go, and the order nisi must be discharged.

GRANTHAM, J. I am of the same opinion, and I do not think that the case of *Reg.* v. *Justices of Monmouthshire* (3) can overrule the settled practice. The point taken in support of the applica-

(1) 2 L. M. & P. 263; S.C. 15 Jur. 358.

(2) 2 B. & S. 811.

(3) 1 D. & L. 145.

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tion is, that the magistrates were required by the older Act to give costs, and are wrong in supposing that this is altered by the later Acts, and have only a ministerial function to perform. If this contention were to prevail, a mandamus might be applied for whenever magistrates come to the conclusion that the earlier legislation has been altered, and act upon the subsequent statutes. Are the magistrates in the present case to be treated as if they had refused to hear and determine? They have decided that they ought not to give costs, and how can we tell them to hear and determine this question, which they have already heard and determined?

Order discharged.

Solicitor for prosecution: *E. W. Beal.*

Solicitors for the justices of the county of London: *Nicholson & Patterson.*

Solicitors for the appellant: *King & Burrell.*

P. B. H.

SMART & SON *v.* WATTS.

1894

Dec. 18.

Adulteration—Sample—Purchase for Analysis—Contemporaneous Admission of Offence by Seller—Notification to Seller—Condition precedent to Prosecution—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 13, 14 *—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 12.

The notification required by s. 14 of the Sale of Food and Drugs Act, 1875, to be given by an inspector after the completion of a purchase of his intention to have the article purchased analysed by the public analyst is a condition precedent to a prosecution under the Act, and cannot be dispensed with although there is a contemporaneous admission by the seller of an offence against the Act. An analysis of the article purchased is also in similar circumstances a condition precedent to a prosecution.

CASE stated by justices for Middlesex.

The appellants had been summoned to answer two informations under s. 6 of the Margarine Act, 1887. The first information charged them with having exposed margarine for sale by retail without having attached to each parcel the label required by the section; the second with having sold margarine by retail without delivering it to the purchaser in or with a paper wrapper marked "margarine."

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At the hearing the evidence given proved the facts stated in the informations. It was further shewn that the respondent, an inspector under the Sale of Food and Drugs Act, 1875, asked for a quarter of a pound of butter and was served by the wife of the manager of the appellants, and that when he called her attention to the matter she admitted that the substance sold was not butter but margarine, but stated that she was only serving temporarily in her husband's absence. Her husband, the manager, was sent for, and on his arrival also admitted that the substance sold was margarine. In consequence of these admissions the inspector did not give them notice that the article was purchased for analysis, nor did he procure an analysis to be made, regarding it as an unnecessary expense.

No evidence was offered on behalf of the appellants; but it was contended on their behalf (1.) that the statements of the manager and his wife, not being made in the presence of the appellants, were not evidence against them, and that there was therefore no evidence that the article was margarine; (2.) that under the provisions of the Sale of Food and Drugs Act, 1875, the respondent should have notified his intention to have the article analysed, and should have procured an analysis to be made.

The justices found as a fact that the substance sold was margarine, and that no label was attached to it when exposed for sale on the counter, and that no paper wrapper on which was printed "margarine" containing, or with it, was delivered to the respondent. They further found as a fact that when the respondent asked for butter he did so with the intention of having the article sold to him analysed with the view of ascertaining whether it was butter or margarine, but that he abandoned that intention as soon as he was informed by the manager's wife that the substance was in fact margarine. The appellants were convicted on both informations.

The question for the opinion of the Court was whether the justices were justified in point of law under the circumstances in convicting the appellants. (1)

(1) By s. 6 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), "Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom and sides, in printed

Bonsey, for the appellants. The conviction was wrong. The inspector ought to have strictly followed the procedure laid down in s. 14 of the Sale of Food and Drugs Act, 1875, the provisions of which section are for the benefit of the seller: *Parsons* v. *Birmingham Dairy Company*. (1) The notice of the intention to have the article analysed and the analysis itself are conditions precedent to a conviction. A notice that the article is bought for analysis, without adding the words "by the public analyst," is not a compliance with the requirements of the section: *Barnes* v. *Chipp*. (2) A notification in the terms of s. 14 was imperative, and the inspector should also have divided and dealt with the article as required by that section. Further, under s. 13 it is obligatory upon the inspector actually to submit

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capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square "margarine"; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'margarine.'"

By s. 12 all proceedings under the Act, save as expressly varied, are to be the same as prescribed by ss. 12–28 inclusive of the Sale of Food and Drugs Act, 1875.

By s. 13 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), any of the officers named in the section may procure any sample of food or drugs, and if he suspect it to have been sold to him contrary to any provision of the Act, "shall submit the same to be analysed by the analyst . . . . ," who is to give a certificate specifying the result of the analysis.

By s. 14, "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst. . . . "

By s. 20, "When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence . . . ."

By s. 21 the certificate of the analyst is made sufficient evidence of the facts stated in it; but the defendant may require that the analyst shall be called as a witness.

(1) 9 Q. B. D. 172.

(2) 3 Ex. D. 176.

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the article to analysis; and apart from that section it must be inferred from the language of ss. 20 and 21 that the procurement of an analysis is a condition precedent to a prosecution.

The admissions made by the manager and his wife are not evidence against the appellants where the charge is one of a criminal offence.

J. C. Earle, for the respondent. It was unnecessary to give notice of analysis or to have an analysis made, having regard to the fact of the admissions made by the sellers' agents. Under the Margarine Act it is unnecessary to determine the quality of the substance sold; it is sufficient to shew that it is not butter. The decisions under s. 6 of the Sale of Food and Drugs Act are not in point; that section requires that the sale shall be to the prejudice of the purchaser, and an analysis of the article sold is therefore necessary; the Margarine Act contains no such requirement.

WILLS, J. Having regard to the facts of this case, I regret the conclusion at which I feel compelled to arrive upon a consideration of the authorities and of the language of the Act of Parliament. It is clear that the formalities required to be taken under the Sale of Food and Drugs Act are, by s. 12 of the Margarine Act, expressly incorporated into that statute, and it is equally clear that the provisions of the earlier Act have not been complied with. I regret that it should be necessary to incur what seems to be a needless expense in cases where the fact is not disputed; but I am unable to get over the very precise language of the Act of Parliament. The appeal must be allowed and the conviction quashed.

WRIGHT, J. I am of the same opinion, and have nothing to add.

Convictions quashed.

Solicitors for appellants: *Neve & Beck.*

Solicitors for respondent: *Sir Richard Nicholson.*

W. J. B.

HAMMOND *v.* PULSFORD.

1894
Dec. 11, 13.

Master and Servant—Employment of Young Person in Shop—Non-exhibition of Statutory Notice in Shop—Shop Hours Act, 1892 (55 & 56 *Vict. c.* 62), *ss.* 3, 4, 5.

By s. 3 of the Shop Hours Act, 1892, no young person is to be employed in or about a shop for more than seventy-four hours in any one week. Sect. 4 provides for the exhibition by the employer in a conspicuous place in his shop of a notice referring to the provisions of the Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop; the section does not provide a penalty for an omission to comply with its requirements. By s. 5, when any young person is employed in or about a shop contrary to the provisions of the Act, the employer is made liable to a fine not exceeding one pound for each person so employed.

The respondent, who had employed a young person in a shop in which the notice required by s. 4 was not exhibited, but had not employed her for more than the lawful number of hours, was summoned before justices for having employed a young person in or about a shop contrary to the provisions of the Shop Hours Act, 1892, by reason of having employed her in a shop where the notice required by s. 4 was not exhibited:—

Held, that the provisions of s. 5 could not be read into s. 4, and that the mere omission to exhibit the statutory notice in the shop did not render the respondent liable to the penalty imposed by s. 5 for employing a young person in a shop contrary to the provisions of the Act.

Case stated by justices for Warwickshire.

The respondent had been summoned to answer an information, under s. 4 of the Shop Hours Act, 1892, charging him with having employed one Florrie Lamprell, a young person within the meaning of the Act, in or about a shop contrary to the provisions of the Act—to wit, that he employed her in or about a shop in which a notice referring to the provisions of the Act and stating the number of hours in the week during which a young person might lawfully be employed in that shop was not kept exhibited in a conspicuous place by the respondent, the employer of such young person. On the hearing it was proved that the respondent did employ in his shop a young person within the meaning of the Shop Hours Act, 1892 (1), and that the notice

(1) Although not specifically stated in the case, it was admitted that the young person was not employed in the respondent's shop for more than the lawful number of hours.

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required to be exhibited by s. 4 of that Act was not exhibited in the respondent's shop. (1) It was contended on behalf of the appellant that ss. 4 and 5 of the Act should be read together, and that although no penalty was specifically provided in case default was made in not exhibiting the notice under s. 4, the penalty enacted in s. 5 was to be read into and made applicable to neglect of the provisions of s. 4, where a young person was employed in the shop. The justices were of opinion that the information charged the respondent with committing an offence under s. 4, and that, no penalty being provided for the contravention of that section, the information must be dismissed.

The questions for the opinion of the Court were:—

1. Whether any penalty was provided by the Act for the employment of a young person in a shop where the statutory notice was not exhibited.

2. Whether the penalty specified in s. 5 could be inflicted in respect of the offence alleged in the information to have been committed, and deemed by the justices to have been proved in fact. (2)

Pritchett, (*Evans Austin*, with him), for the appellant. The respondent should have been convicted. It is as much an employment in contravention of the provisions of the Act if a young person is employed in a shop where the statutory notice, intended for her protection, is not exhibited, as if she is employed in a shop for more than the lawful number of hours. If the justices are right, the respondent is liable to no penalty for an

(1) By s. 3 of the Shop Hours Act, 1892 (55 & 56 Vict. c. 62), no young person may be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week.

By s. 4: "In every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop."

By s. 5: "Where any young person is employed in or about a shop contrary to the provisions of this Act, the employer shall be liable to a fine not exceeding one pound for each person so employed."

(2) It was stated during the argument that a previous summons had been taken out against the respondent under s. 4 for failing to exhibit the statutory notice, and had been dismissed on the ground that no penalty was provided for non-compliance with that section.

admitted breach of the statute; he cannot be indicted, for by s. 7 all offences under the Act are to be prosecuted in like manner as offences under the Factory and Workshop Act, 1878—that is, before a court of summary jurisdiction.

[GRANTHAM, J. If you are right, an employer who omits to put up the statutory notice is liable under this Act to a fine of 20*s.* for every young person employed in his shop, whereas under s. 78 of the Factory and Workshop Act he is only liable to a fine of 40*s.* however many young persons may be employed about his factory or workshop.]

No one appeared on behalf of the respondent.

Cur. adv. vult.

1894. Dec. 13. POLLOCK, B. I have come to the conclusion that this appeal should be dismissed. The statute was passed to amend the law relating to the employment of young persons in shops, and it provides two distinct things: first, by s. 3, that the hours of employment are to be limited to seventy-four in any one week; secondly, by s. 4, that a notice specifying the lawful hours of employment is to be exhibited in the shop. There is also s. 5, which provides a penalty for the employment of young persons in a shop contrary to the provisions of the Act. It is argued on behalf of the prosecution that the penalty has been incurred by the respondent because a young person has been employed in his shop contrary to the provisions of the Act—that is, in a shop where the provisions of s. 4 have not been complied with. If the prosecution had been under s. 3 for employing a young person for more than the lawful number of hours, and the facts had been proved, it is obvious that the shopkeeper would have employed a young person contrary to the provisions of the Act. But the words being what they are, it seems a forced construction to hold that a young person has been employed contrary to the provisions of the Act simply because no notice was exhibited in the shop where a young person was employed; very harsh consequences would ensue if the appellant's contention is correct. If the mere absence of notice is all that is necessary in order to bring s. 5 into operation, the employer does not

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HAMMOND v. PULSFORD.

Pollock, B.

become liable to any specific penalty for not exhibiting the notice, but to a penalty not exceeding 20*s.* for each young person employed; in other words, the amount of the penalty would depend upon the accident of the number of young persons employed by him. It seems to me that there are very strong reasons why the legislature should not have intended s. 5 to apply to such a case, though it is hardly necessary to go into them, for where a statute requires a thing to be done, but does not impose a specific fine for not doing it, it is not for the Court inferentially to draw the conclusion that a penalty is incurred. If we look at the Factories and Workshops Act, 1878, we find an express provision in s. 78 requiring the affixing in factories and workshops of an abstract of the Act and certain prescribed notices, and in the event of a contravention of the section the occupier of the factory or workshop is made liable to a fine not exceeding 40*s.* There the amount of the fine does not depend on the number of persons employed, but on non-compliance with the requirements of the Act of Parliament, and in respect of that a specific fine is imposed by the statute itself. Although one would expect a fine to be provided by s. 4, I do not think that s. 5 covers an offence under the earlier section. In my opinion, the justices came to a proper conclusion in holding as they did, and the appeal should be dismissed.

GRANTHAM, J., concurred.

Judgment for the respondent.

Solicitors for appellant: *Field, Roscoe & Co., for Field & Sons, Leamington.*

W. J. B.

[CROWN CASE RESERVED.]

1894
Dec. 8.

THE QUEEN *v.* WORTON.

Gaming—Place used for Betting—"Betting with Persons resorting thereto"—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

The defendant was convicted on three counts, which charged him with using the bar of a beerhouse, on three different days, for the purpose of betting with persons resorting thereto, contrary to s. 1 of the Betting Act, 1853.

It was proved that on each of the three days the defendant was in the bar, and a number of persons came in, took slips of paper which were hanging on the wall, wrote on the slips the names of the horses they wished to back for races, wrapped up in the slips the money they staked, and handed the slips with the money enclosed to the defendant. Usually the defendant went outside, and received the slips and money on the doorstep of the house, but on one of the three days he received two slips, with money enclosed, in the bar:—

Held, that there was evidence to go to the jury that the defendant had used the bar for the purpose of betting with persons resorting thereto on each of the three days, and he was rightly convicted.

CASE stated by the recorder of Birmingham.

The defendant was tried at quarter sessions (1) on an indictment, the first count of which alleged that he, on August 23, 1894, unlawfully did use a certain room, usually called the "bar," at a certain licensed beerhouse, known by the name of the "William the Fourth," for the purpose of the defendant, when so using the same as aforesaid, betting with persons resorting thereto, contrary to the statute (2), &c.

(1) The defendant was charged before a court of summary jurisdiction, and claimed to be tried by a jury under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17.

(2) The Betting Act, 1853 (16 & 17 Vict. c. 119):—

By s. 1, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race . . . . or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

By s. 3, "Any person who being

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The third and fifth counts alleged similar offences on August 24 and 25.

The evidence, which was set out in the case, proved the following facts.

The defendant was seen in the bar of the beerhouse on each of the three days above mentioned, when a number of persons came into the bar, took slips of paper, which were hanging on the wall, wrote on these slips the names of horses which they wished to back for different races, and the amounts for which they wished to back the horses, wrapped up in the slips of paper coins equal to such amounts, and handed the packets, consisting of money wrapped up in the slips of paper on which were written the names of the horses backed, to the defendant. Usually the defendant went out, and received the packets outside the door of the house; but the jury found, in answer to a question left to them, that the defendant received two such packets in the bar-room on August 25.

At the close of the evidence for the prosecution counsel for the defendant referred to the case of *Bond* v. *Plumb* (1), and submitted that there was no evidence to go to the jury of the defendant using a place for the purpose of betting with persons resorting thereto, although there was evidence of his using a place for the purpose of money being received as the consideration for an undertaking to pay thereafter money on an event relating to a horse-race.

The recorder held that there was evidence to go to the jury, and directed them that there were two main questions for their consideration, first, whether the defendant did use the bar-room on the days in question, or on any of them,—and, secondly, if he did, was he using it for the purpose of betting with persons resorting thereto?

The recorder also directed the jury that if, whilst he was using the room, the defendant intended to bet with persons resorting thereto, and merely went out to take their bets outside, and then

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the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them," is made liable to a penalty.

(1) [1894] 1 Q. B. 169.

came back to be ready for more, this would be no more than a colourable evasion of the Act, and what took place outside would be strong evidence of the purpose for which defendant was using the room.

The jury found the defendant guilty on the first, third, and fifth counts of the indictment.

The question for the opinion of the Court was, whether there was any evidence to go to the jury on counts 1, 3, or 5 of the indictment.

No counsel appeared to argue the case on either side.

LORD RUSSELL of KILLOWEN, C.J. I am hardly surprised to find that no one appears to argue, for on the case submitted for the opinion of the Court the question is very clear. The defendant, Worton, was indicted at the Michaelmas quarter sessions at Birmingham, on an indictment containing several counts, and he was found guilty, on counts 1, 3, and 5, of similar offences committed on each of three days, namely, August 23, 24, and 25. The charges against him, on which he was convicted, were that on each of these three days he used the bar of the beerhouse William the Fourth for the purpose of betting with persons resorting thereto, contrary to the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1. The evidence shewed that on each of the days in question he habitually resorted to the bar of the beerhouse, and that a number of people, mostly of the humbler class, came there to bet with him. Provision was made for betting in the beerhouse by the supply of slips of paper on which the persons who came to bet wrote the names of the horses which they wished to back, and they then wrapped up in the slips of paper the stakes which they intended to deposit. Usually they went outside and handed over the packets containing the names of the horses and the stakes to the defendant outside the door of the house; but on one of the days in question two such packets were handed over to the defendant in the bar. At the close of the case for the prosecution the defendant's counsel put forward a submission, which I must characterise as a submission of an extraordinary kind. He referred to the case of *Bond* v. *Plumb* (1), and submitted that there was no

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Lord Russell, C.J.

evidence to go to the jury of the defendant using the bar for the purpose of betting with persons resorting thereto, although there was evidence of his using it for the purpose of money being received as the consideration for an undertaking to pay thereafter money on an event relating to a horse-race. The transactions described by the witnesses simply amount to ready-money betting, and no evidence could be clearer to shew that betting was carried on. The first part of the section prohibits using a house, &c., for the purpose of betting with persons resorting thereto, and the second part prohibits using such a place for the purpose of the person using it receiving money as the consideration for a promise to pay money on any event or contingency relating to any race-horse, &c. The betting aimed at by the first part of the section may or may not be ready-money betting. The second part is more directly aimed at ready-money betting. I am quite clear, and I understand that the other members of the Court agree with me, that if a person uses the bar, as the defendant did, for the purpose of meeting the persons with whom he intends to bet, he is using it for the purpose of betting with persons resorting thereto, even if the money is always handed over to him outside the door of the house. *Bond* v. *Plumb* (1) is no authority on the present case, for it only decides that an offence under s. 1 is committed if the place is used for the purpose of betting with persons resorting thereto, and equally so if it is used for the purpose of receiving deposits on bets. On the facts stated in the present case the question is whether there was any evidence to go to the jury on counts 1, or 3, or 5 of the indictment. I am clearly of opinion that there was ample evidence to justify the conviction, which must therefore be affirmed.

POLLOCK, B. I am of the same opinion, and I have nothing to add.

HAWKINS, J. I have nothing to add, except that I consider the case too clear for argument.

LAWRANCE and WRIGHT, JJ., concurred.

Conviction affirmed.

(1) [1894] 1 Q. B. 169.

P. B. H.

BURY *v.* THOMPSON.

1894
Dec. 6, 13.

Landlord and Tenant—Lease—Proviso to determine by Notice—Sufficiency of Notice.

The plaintiff sued for a declaration that the term of years created by a lease, under which he was tenant to the defendant, had been determined by notice.

The lease was for twenty-one years from Christmas, 1887, subject to a proviso "that if the lessee shall be desirous of determining this demise at the end of the 7th or 14th year of the said term and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such 7th or 14th year," the lease should determine.

On October 21, 1893, the plaintiff wrote to the defendant, "I see that my first seven years will be determined on December 25, 1894 . . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt."

Negotiations for a reduction of rent followed, and continued until within six months of the termination of the first seven years of the term, when the defendant refused any reduction:—

Held, that the letter of October 21, 1893, was sufficient to determine the term created by the lease, and the plaintiff was entitled to a declaration that the term had been determined.

SPECIAL CASE stated in an action in which the plaintiff claimed by the writ a declaration that the term of years created by a lease had been determined by the plaintiff on December 25, 1894, by notice pursuant to a proviso in the lease.

By the lease, dated February 25, 1888, the defendant demised to the plaintiff a messuage and premises known as No. 33, Courtfield Road, in the parish of St. Mary Abbotts, Kensington, in the county of Middlesex, for the term of twenty-one years from December 25, 1887, determinable nevertheless as thereinafter mentioned, at the yearly rent of 270*l.*, payable quarterly on the usual quarter-days.

The lease contained a proviso in the terms following: "Provided always and it is hereby agreed and declared that if the lessee shall be desirous of determining this demise at the end of the 7th or 14th year of the said term and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such 7th or 14th year then and in such case at the

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end of such 7th or 14th year as the case may be the said term hereby granted shall absolutely cease and determine save and except as to any right that may previously have accrued to either of the parties hereto and which may then remain unsatisfied."

In and between October, 1893, and July, 1894, correspondence took place between the plaintiff and the defendant, of which the following are the material parts :—

Plaintiff to Defendant.

October 21, 1893.

"I have just been looking at my lease, and I see that my first seven years will be determined on 25th December, 1894.

"I have been making inquiries for some time past, and I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are able to let for now.

"I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made.

"I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt."

Defendant to Plaintiff.

October 23, 1893.

"I think your idea of rent is considerably too low, but I should be glad to meet your views if possible, therefore, if you will at once waive your right to determine the lease at Christmas next year, I will agree to take a reduced rent of 20*l.* per annum, making it 250*l.* in lieu of 270*l.* for the second period of seven years."

Plaintiff to Defendant.

April 2, 1894.

"I ought to have answered your letter concerning the rent before . . . . With regard to the rent, I think 230*l.* is quite enough, as the house is really very badly built, and necessitates constant expenditure in repairs.

"Moreover we have clearly been paying too much rent during the last seven years, so one thing might be set against the other."

Defendant to Plaintiff.

April 3, 1894.

33, Courtfield Road.

"I think your proposal to reduce the rent to 230*l.* is too low, but in order to meet your wishes as far as I can I will agree to reduce the rent to 240*l.* for the second period of seven years, if you will at once waive your right to determine the lease at Christmas next."

Plaintiff to Defendant.

July 6, 1894.

33, Courtfield Road.

Expressing unwillingness at present "to take a seven years' lease of this house.

"If however you care to let us go on for another year from the 25th March next, at the rent of 240*l.*, on the terms of the old lease, I would be willing to remain a tenant at this rent."

Defendant to Plaintiff.

July 7, 1894.

33, Courtfield Road.

"As you did not give me notice to determine the tenancy, I quite understood that you had made up your mind to continue for another seven years, and I can see no reason now for altering the terms of the lease."

The questions for the opinion of the Court were:—

(1.) Whether the letter of October 21, 1893, was sufficient and effectual to determine the term of years created by the lease.

(2.) Whether the defendant was estopped by his conduct from denying that it was a notice sufficient and effectual for that purpose.

1894. Dec. 6. *R. M. Bray*, (*Edward Bray*, with him), for the plaintiff. The letter of October 21, 1893, is a clear, distinct, and unambiguous notice of intention to determine the lease as from Christmas, 1894, in accordance with the terms of the proviso. The addition of the words "unless some reduction is

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made" does not make it a notice in the alternative: *Ahearn* v. *Bellman*. (1) The true interpretation is that the plaintiff expresses his intention to determine the present tenancy in any event, but at the same time offers to accept a new tenancy at a reduced rent, and this view is adopted by the defendant himself, when he offers a reduction. The plaintiff therefore is entitled to a declaration that the lease is determined.

Alfred Lyttleton, for the defendant. This notice is not clear, distinct, and unambiguous in its terms, but is an alternative notice, either to determine the tenancy, or to remain at a reduced rent. In *Ahearn* v. *Bellman* (1) the notice to quit was absolute. The defendant never treats it as a notice to determine, for he twice writes "if you will waive your *right* to determine the lease," not "your *notice* to determine." The opinion expressed by Lord Mansfield, C.J., in *Doe* v. *Jackson* (2) is good law, and applies to the present case. [He also referred to *Muskett* v. *Hill*. (3)]

Edward Bray, in reply. What Lord Mansfield said in *Doe* v. *Jackson* (2) is only a dictum; it is inconsistent with the decision of the majority of the Court in *Ahearn* v. *Bellman* (1), and must now be treated as overruled.

Cur. adv. vult.

1894. Dec. 13. The following judgments were delivered:—

POLLOCK, B. In this case the plaintiff claimed a declaration that the term of years created by the lease of February 25, 1888, had been determined by notice, as from December 25, 1894, and the defendant contended that he had received no sufficient notice to determine the lease. The lease was for twenty-one years, subject to a proviso that if the lessee should be desirous of determining it at the end of the seventh or fourteenth year, and should give the lessor six months' notice of his desire, the lease should be determined. The notice relied upon by the plaintiff is contained in a letter written by him to the defendant on October 21, 1893, that is, more than a year before the first seven years of the lease would expire. In that letter the

(1) 4 Ex. D. 201. (2) Dougl. 175.
(3) 5 Bing. N. C. 694.

plaintiff complains that the rent of 270*l.*, which he has been paying, is too high, and continues as follows: "I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt." This letter is acknowledged by a letter of October 23, in which the defendant, the landlord, suggests that some reduction should be made, but less than the plaintiff asks for, and further correspondence ensues; but the parties never come to an agreement as to the amount of the reduction. No further or better notice was given, and therefore the only question is, whether, considering the terms of the letter of October 21, it amounts to a good and sufficient notice to determine the lease. In order to constitute a valid notice no particular form of words is required. The question is whether the notice merely states that, if the landlord does not lower the rent, the tenant will hereafter be obliged to give notice, or is it in itself a sufficient notice to determine the lease. To shew that a notice in the alternative would not be sufficient authority is hardly required; but there is the opinion of Lord Mansfield, C.J., in *Doe* v. *Jackson*. (1) If this only amounted to a notice that, either a lower rent must be accepted, or the tenant would be obliged to leave, then, according to Lord Mansfield's judgment, it would be insufficient. But in the case of *Ahearn* v. *Bellman* (2) the majority of the Court of Appeal held that Lord Mansfield's objection did not apply where there was a definite statement that the tenancy was determined, although it was followed by a further statement that if the tenant retained possession the rent would be raised. In that case a landlord gave notice to a yearly tenant in these terms: "I hereby give you notice to quit . . . on or before May 1, 1878. And I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental . . . will be 160*l.*," &c. Bramwell and Cotton, L.JJ., held that this notice to quit, being otherwise sufficient, was not rendered invalid by the additional clause. In the same way I think that the notice given in the present case is not a notice in the alternative, or a notice on which the landlord would not be entitled to act, but

(1) Dougl. 175. (2) 4 Ex. D. 201.

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is a good and sufficient notice, and the plaintiff is entitled to the declaration which he asks for. The result is that our judgment must be for the plaintiff with costs.

GRANTHAM, J. I am of the same opinion. Reading the letter of October 21, 1893, I do not see how it can be said that it does not amount to a clear, distinct, and unambiguous notice by the plaintiff of his determination to give up his tenancy at Christmas, 1894. It is true that in the same letter he expresses his willingness to continue as tenant under a different arrangement; but what difference can it make whether he expresses this by adding five words at the end of the sentence, as is done here, or begins a fresh paragraph, as was done in *Ahearn* v. *Bellman*? (1) In either case it is a clear and intelligible notice. The tenant expresses his desire to terminate the present tenancy, and make some new arrangement. He says plainly: "I shall not be able to stop unless some reduction is made," and the landlord accepts this offer by proposing to go on at a reduction of 20*l.*, which the tenant declines, offering to take a reduction of 40*l.* The negotiations go on until within six months of the end of the seven years, when the landlord turns round and repudiates the notice of October 21, 1893, though he knew from that notice that the plaintiff wished to give up his tenancy at Christmas, as the reduction of rent which he required had not been made.

Judgment for the plaintiff.

Solicitor for plaintiff: *T. F. Adshead.*

Solicitors for defendant: *Gush, Phillips, Walters, & Williams.*

(1) 4 Ex. D. 201.

P. B. H.

EVANS, Appellant; OWENS and Another, Respondents. 1894

Dec. 11.

Fishery Acts—Salmon and Freshwater—Fishery District—Secretary of State's Certificate—Definition of Limits—Tributary of River, what is.

A Secretary of State's certificate, made under the Salmon Fishery Acts, 1861, 1876, defined the limits of the Severn Fishery District as including "so much of the River Severn and of all the tributaries of the said river" as was situate within certain specified counties:—

Held, that a brook running into a river, which ran directly into the Severn, was a "tributary" of the Severn within the meaning of the certificate.

Case stated by two justices of the peace of the borough of Llanfyllin, in the county of Montgomery, under the Summary Jurisdiction Acts.

An information was preferred before the justices by the appellant, a water bailiff of the Board of Conservators of the Severn Fishery District, charging the respondents with having, at the parish of Llanfyllin, in the same borough, being a place within the Severn Fishery District, unlawfully taken trout without having a licence from the Board, and contrary to the provisions of the Salmon Fisheries Act, 1873 (36 & 37 Vict. c. 71), s. 22, as amended by the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7.

It was proved at the hearing of the information that the respondents had taken trout without a licence, and contrary to the provisions of the above statutes, in a streamlet, which appeared to have no name, in the parish of Llanfyllin; that such streamlet ran into a brook called the Cain, and that the Cain ran into the River Vyrnwy, which flows directly into the River Severn.

On September 20, 1882, a certificate was duly made, under the Salmon Fishery Acts, 1861 to 1876, by Her Majesty's Principal Secretary of State for the Home Department, defining the limits of the Severn Fishery District. By this certificate, after reciting that two certificates defining the limits of the district had previously been made by Secretaries of State, and that it was expedient that the limits should be further altered by including therein "all tributaries whatsoever of the said River Severn"

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within (amongst other specified counties) the county of Montgomery, it was declared and certified that the limits of the River Severn and of the Fishery District of the River Severn should include (inter alia) "so much of the River Severn and of all the tributaries of the River Severn as is situate within" the counties specified therein, including the county of Montgomery.

It was contended on behalf of the respondents that the limits of the Severn Fishery District were confined to the River Severn and its direct tributaries, and did not include streamlets, streams, or brooks running into such tributaries; that the streamlet in which the respondents took the trout was, therefore, not within the jurisdiction of the Severn Fishery Board, and persons fishing therein did not require a licence from the Board.

The justices dismissed the information, being of opinion that the streamlet in which the respondents took the trout was not within the limits of the Severn Fishery District.

The question for the opinion of the Court was whether or not such streamlet was within such district as defined by the certificate of September 20, 1882.

Willis Bund, for the appellant. The justices ought to have convicted the respondents. The stream in question is a tributary of the River Severn within the meaning of the Secretary of State's certificate. The point has been decided by the Queen's Bench Division in *Hall* v. *Reid*: see note to *Harbottle* v. *Terry*. (1) *Merricks* v. *Cadwallader* (2) is distinguishable. The certificate in that case specified the Rivers Vyrnwy and Teme, which were direct tributaries of the Severn, and the Court held that the words "all other tributaries of the River Severn" were confined to tributaries of the same kind as the specified rivers—namely, direct tributaries. In consequence of that decision the certificate now in force has been made in wider terms.

No counsel appeared for the respondents.

WILLS, J. This is a perfectly clear case. The certificate of the Secretary of State throws into the district of the Severn Fishery Board all the "tributaries" of the River Severn. A

(1) 10 Q. B. D. at pp. 134, 135. (2) 51 L. J. (M.C.) 20.

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WILLS, J.

tributary is a thing which contributes, and I cannot understand why a stream should be less a tributary of the River Severn because, before it reaches the Severn, it passes through a stream with another name. The object of this legislation was to protect fish, and, so far as that object is concerned, the names of rivers have nothing to do with the matter. *Merricks* v. *Cadwallader* (1) is a case perfectly distinguishable from the present. In that case the Secretary of State's certificate had so dealt with certain streams as not to bring the stream in question within the protected district. There is nothing of the kind here. In consequence probably of that decision larger and more comprehensive language has been adopted in the certificate now before us. I can well understand the decision. There were streams which ran directly into the Severn, and were named in the certificate. The Court arrived at the conclusion that the ejusdem generis doctrine applied to the "other tributaries" mentioned in the certificate, so that those words were confined to direct tributaries. The doctrine does not apply here. The case must, therefore, go back to the justices with this intimation of our opinion.

WRIGHT, J. I agree.

Case remitted accordingly.

Solicitors for the appellant: *Stallard & Turner, for John Stallard, Junior, Worcester.*

(1) 51 L. J. (M.C.) 20.

W. A.

1894
Dec. 10.

HARRIS, APPELLANT *v.* THE LONDON COUNTY COUNCIL, RESPONDENTS.

Weights and Measures—False or Unjust Measure—Milk Churn—Gauge indicating Quantity contained—Measure for Use for Trade—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The appellant was convicted, under s. 25 of the Weights and Measures Act, 1878, of having false measures in his possession for use for trade. He sold milk to a purchaser, and sent it by train in his own churns, which were fitted with gauges to indicate the number of gallons they contained, and the contract of carriage between the appellant and the railway company provided that they should be so fitted. By his contract with the appellant the purchaser was entitled to have the churns regauged when he deemed it necessary. The magistrate found that, in the dealings between the appellant and the purchaser, and between the appellant and the railway company, the gauged churns were used as measures, and that two churns, purporting to contain sixteen gallons each, contained two pints less :—

Held, that the gauged churns were measures, which the appellant had in his possession for use for trade, within the meaning of the Act, and he was rightly convicted.

CASE stated by a metropolitan police magistrate.

The appellant was summoned by the respondents for having, on two different days, at Euston Station, unlawfully had in his possession for use for trade two certain measures, to wit two milk churns numbered 1014 and 1015, which were alleged to be false or unjust, whereby he might become liable to the penalty provided by s. 25 of the Weights and Measures Act, 1878. (1)

The following facts were proved or admitted.

An agreement in writing was entered into between Handsley, a dairyman and milk vendor in London, and the appellant, who was a farmer at Leigh in Staffordshire, whereby Handsley agreed to purchase, and the appellant agreed to sell, the whole of his milk, in his own churns, carriage paid by train to London, at certain specified prices per imperial gallon of eight pints. The agree-

(1) 41 & 42 Vict. c. 49. By s. 25, "Every person who uses, or has in his possession for use for trade, any weight, measure, scale, balance, steelyard, or weighing machine, which is false or unjust, shall be liable to a fine not exceeding 5*l.*, or in the case of a second offence 10*l.*, and any contract, bargain, sale, or dealing made by the same shall be void, and the weight, measure, scale, balance, or steelyard shall be liable to be forfeited."

ment provided that Handsley might, at any time when he deemed it necessary, at the expense of the appellant, have any churns regauged, and that churn labels should be provided by the appellant.

The course of the sales and dealing between the appellant and Handsley under the agreement was as follows.

The milk was delivered by the appellant to Handsley in churns or cans, each capable of containing about sixteen or seventeen gallons, and belonging to the appellant. Each of them was fitted inside with gauges, consisting of triangular plates of brass soldered into the side of the churn at such heights as to indicate the number of imperial gallons of fluid in the churn.

After the milk had been placed in the churns at the appellant's farm it was taken to the railway station, and the churns were then, pursuant to a contract between the appellant and the railway company, handed to the railway company with a consignment note instructing the railway company to forward such churns by passenger train, at their reduced owner's risk rate, to Handsley at Euston Station, the carriage being paid by the appellant. The appellant was accustomed to attach to one of the churns of the consignment an address label, signed by him, stating the number of churns in the consignment, and the aggregate number of imperial gallons in the whole consignment.

The amount paid by the appellant to the railway company for carriage was $1\frac{1}{2}d.$ per gallon, or part of a gallon, and his contract with the company contained the following terms: "Each can must have the number of imperial gallons it is capable of taking marked upon it, and the inside of each can must be marked to indicate the space occupied by four gallons and by each additional gallon. Senders must in each case sign consignment notes shewing the actual quantity of milk in imperial gallons in each can to be forwarded, the name of the consignee, and the station to which it is to be sent."

Upon their arrival at Euston the churns were placed under the charge of a milk porter of the railway company, and remained under his control until they were delivered by him to one Tuckerman, the station foreman of Handsley.

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The railway company treated the churns as measures of the quantity of milk carried, and tested such quantity only by the gauges. They did not, however, check the contents of each churn of each consignment, but found it sufficient to check a few churns now and then by looking at the gauges and comparing the contents of the churn as so ascertained with the statement of contents on the consignment note or way-bill.

Upon receiving such a consignment Tuckerman took the label off the churn to which it was affixed, and proceeded to ascertain the quantity of milk in each churn by ascertaining the height of the milk inside the churn with reference to such gauges, and the quantity so ascertained with respect to each churn was entered by him in his note-book. He then compared the figures in his note-book with those stated in the railway book and the way-bill for that consignment, and, having satisfied himself that the numbers obtained by him agreed with the numbers stated in the railway book and way-bill, he signed for that amount and accepted delivery. In case of a discrepancy between the quantity shewn by the churns and the quantity stated in the railway book or way-bill, he would sign only for the quantity shewn by the churns. Tuckerman stated that he relied entirely on the gauge.

The milk was then taken to the premises of Handsley. Wayte, foreman to Handsley, was called, and said, "I ought by rights to test the milk on its arrival with an imperial measure, and I do measure some—not all; I go by the mark inside."

Handsley was called, and stated that the churn gauges were the measure by which he received the milk, and that he had never tested the quantity of milk.

On April 26, 1894, the appellant consigned from Leigh to Euston Station four churns, including churn No. 1014, with the label attached shewing that the total amount of the consignment was sixty-six gallons. On April 27, 1894, a similar consignment was made by the appellant, in three churns, including the churn No. 1015, with a label attached shewing the total consignment to amount to fifty gallons. The two churns Nos. 1014 and 1015 were marked on the inside with gauges as hereinbefore described, and the consignments were dealt with in

the manner and pursuant to the course of dealing hereinbefore described.

The two churns Nos. 1014 and 1015 were subsequently handed by Handsley to the respondents to be tested.

The inspector to the respondents tested the gauging of the churns with imperial stamped measures, and found them both, when filled to the sixteen-gallon mark, to contain two pints less than sixteen gallons. He did not not test the churns by any standard churn, as mentioned by Regulation No. 31 of the Board of Trade Regulations, 1890, and he knew of no standard churn in use by the respondents for purposes of testing.

The appellant's housekeeper was called, and stated that the milk was measured by the imperial gallon filled from a quart measure. When put in the churn sometimes the milk was above the gauge, sometimes under. If the milk was not up to the gauge, it was filled up to avoid disputes.

The inspector of weights and measures for the district in which the appellant resided proved that in the district of his local authority there were, so far as he knew, no stamped churns because the question of stamping churns was still under consideration.

Neither the respondents nor the Staffordshire County Council had any standard churn, and the churns Nos. 1014 and 1015 had never been compared with any such standard churn for the purpose of verifying their capacity. The magistrate found that, in the dealings between the appellant and Handsley, and between the appellant and the railway company, the gauged churns were used as measures, that the churns Nos. 1014 and 1015, purporting to contain sixteen imperial gallons each, did in fact each contain two pints less than sixteen imperial gallons.

Upon the above facts the magistrate held that the two churns were measures, within the meaning of s. 25 of the Act, and that they were false or unjust, and he accordingly convicted the appellant.

The question of law for the opinion of the Court was, whether upon the above facts the appellant was rightly convicted.

Bosanquet, Q.C. (*Avory*, with him), for the appellant. These

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churns were not measures for use for trade, within the meaning of s. 25 of the Weights and Measures Act, 1878. They were only used to carry the milk, and the gauging on the inside was intended as a rough guide to the railway company, whose charges would depend on the number of gallons carried. The appellant, therefore, comes within the exemption contained in s. 22, which applies "where it is shewn that such vessel is not used nor intended for use as a measure." The churns are liable to rough usage in transit by railway, especially as by the contract they are carried at owner's risk, and if they are dented their capacity is diminished. They ought not, therefore, to be considered as measures. The appellant ought not to have been convicted, because the inspector of the respondents when testing the churns did not comply with s. 44 of the Act of 1878 and s. 7 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21). He ought to have tested them by a standard churn, and they ought to have been stamped, if they were measures: see ss. 28, 29 of the Act of 1878, and Regulation No. 31 of the Board of Trade Regulations, 1890.

C. A. Cripps, Q.C. (*F. F. Daldy*, with him), for the respondents. The churns were measures, and were so treated throughout by the appellant himself, as well as by Handsley and the railway company. The magistrate has found this as a fact, and his finding disposes of the case.

WILLS, J. I am of opinion that the decision of the learned magistrate was right, and I think that he was right as to both parts of his finding. He has found that, both as between the parties to the contract of sale, and as between the appellant and the railway company, the churns were used as measures. With regard to the contract between the appellant and the railway company, there is no contest as to this, and it is clear that the railway company could have no other gauge. That is enough to support the conviction. But on the other point, also, I am of opinion that the magistrate was right. When it is found that a churn professing to hold sixteen gallons is taken by the purchaser as a measure when he receives the milk at the end of the transit, that is strong evidence to shew that it was used as a measure, within the meaning

of the Act. It is sufficient to say that there was evidence as to the course of dealing which justifies the decision of the magistrate. The object of the legislation is to prevent the use of what Mr. Bosanquet has called "rough" measures, and to ensure that they shall be not rough but definite and accurate. There was enough to justify the magistrate in finding that, as between the parties to the contract of sale, as well as in carrying out the contract between the appellant and the railway company, the churns were used as measures, and that question was for him. For these reasons, I have come to the conclusion that the conviction was right, and must be affirmed.

WRIGHT, J. I have come to the same conclusion. A case might have been set up of injury to the churns caused by their being dented while being carried on the railway, but it does not appear that any such case was made out on the evidence before the magistrate. It appears that these churns were uniformly wrong, and to a substantial extent. I am of opinion that the magistrate was right as to both points. I wish to add that, notwithstanding the requirements of the Act, in my opinion some regard should be had to the nature of the trade, and also to the nature of the vessel in question; and if in a case like this it were, in fact, shewn that the deficiency was caused by the churns having been injured by being dented in course of transit, I should hesitate to convict.

Conviction affirmed.

Solicitors for appellant: *Morris & Bristow, for Smith, Leech, & Bostock, Derby.*

Solicitor for respondents: *W. A. Blaxland.*

P. B. H.

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[IN THE COURT OF APPEAL.]

NORTON *v.* COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY.

Building Society—Arbitration—Jurisdiction of High Court of Justice—Neglect to appoint Arbitrators — Staying Proceedings — Mandamus — Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16, 36.

The rules of a building society provided that disputes between the society and the members should be settled by arbitration; that five arbitrators should be elected by the board of directors; and that in each case of dispute the matters in difference should be decided by three of such arbitrators, to be selected by lot:—

Held, that the High Court had no power to decide such disputes as fell within the rules, and would stay proceedings in an action brought by a member, even though the prescribed number of arbitrators had not been elected at the date of the commencement of the action:

Held, further, that arbitrators might be appointed by the society after the dispute had arisen, and that, if the society neglected to appoint arbitrators in accordance with their rules, the proper course for the member was to apply for a mandamus to compel them to do so.

Christie v. *Northern Counties Benefit Building Society* (43 Ch. D. 62) not approved.

Appeal from an order of Day, J., in chambers, staying proceedings in the action, and directing a reference to arbitrators under the rules of the defendant society.

The Counties Conservative Permanent Benefit Building Society was incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). The 77th rule of the society was as follows: "Disputes shall be settled by reference to arbitration. Five arbitrators shall be elected by the board of directors, but none of the arbitrators shall be interested directly or indirectly in the funds of the society, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or by some person appointed by such party, shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties. In case of a vacancy or vacancies in the office of arbitrator, another or others shall be elected by the board of directors." The plaintiff Emily

Norton was a member of the society. On September 20, 1892, she gave notice to the secretary of her desire to withdraw her money. The directors declined to pay her the money, on the ground, among others, that there were claims in priority to hers. The questions had no reference to any mortgage or document other than the rules of the society; but no suggestion appears to have been made that the matter should be referred to arbitration. After a long correspondence the plaintiff, on September 18, 1894, brought the present action against the society to enforce her claim. On October 24, 1894, the defendants applied by summons to Day, J., in chambers for an order to stay all proceedings in the action, and to refer the matters in dispute to arbitration. The learned judge made the order asked for on November 12, and the plaintiff appealed.

At the time when the action was commenced, and when the order was made by Day, J., there were only three arbitrators of the society; five having been originally appointed, but two having died or resigned. Before, however, the appeal was brought the board of directors appointed two new arbitrators so as to make up the required number.

Morten, and *Shortt*, for the plaintiff. The Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (9), enacts that the rules of every society established under the Act shall set forth whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the court (that is to the county court), or to the registrar, or to arbitration. The rules of the defendant society provide (rule 77) that such disputes shall be settled by arbitration, and that five arbitrators shall be appointed by the directors and their number filled up from time to time. It was, therefore, intended that there should be always a standing board of arbitrators to which disputes should be referred as they arose. This board has not been kept up, and, therefore, the plaintiff had no tribunal to which her claim could be referred. She has, therefore, a right to appeal to the High Court of Justice, otherwise she would have no remedy at all. It is true that since the action has been commenced the directors have

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filled up the number of arbitrators; but it was too late to do so after the action had been commenced. This was distinctly held by North, J., in *Christie* v. *Northern Counties Benefit Building Society*. (1) It is almost impossible that impartial arbitrators should be appointed under such circumstances.

H. Tindal Atkinson, for the defendants. When the rules of a society provide that disputes shall be settled by arbitration, or by the county court judge, or by the registrar, the decision of the appointed tribunal is obligatory and the jurisdiction of the High Court is excluded. Sect. 36 of the Building Societies Act, 1874, is express on that point; and, indeed, the whole scope of legislation from the 10 Geo. 4, c. 56, to the present time has been to substitute the special tribunal for the ordinary courts of law. The point has also been decided by authority in *Municipal Permanent Investment Building Society* v. *Kent* (2), *Wright* v. *Monarch Investment Building Society* (3), and *Hack* v. *London Provident Building Society*. (4) There is nothing in the rules or in reason to prevent the number of arbitrators being filled up after the dispute has arisen, or after the commencement of the action. *Christie* v. *Northern Counties Benefit Building Society* (1) was wrongly decided.

Shortt, in reply. All the cases cited on behalf of the defendants presuppose that there is a tribunal to which the plaintiff can resort. There was none here.

LINDLEY, L.J. This is an appeal from an order of Day, J., which directs "that all proceedings in this action be stayed and all disputes between the plaintiff Emily Norton and the Counties Conservative Permanent Benefit Building Society be referred to arbitration pursuant to rule 77 of the rules of the society." The action was brought by a member who had given notice of withdrawal, her claim being the sums of money stated in the indorsement on the writ; and all the money claimed from the society was claimed by her as a member of the society. At the date of the writ, which was September 18, 1894, the society was governed by rules one of which provided that disputes between

(1) 43 Ch. D. 62.
(2) 9 App. Cas. 260.
(3) 5 Ch. D. 726.
(4) 23 Ch. D. 103.

the society and its members should be settled by reference to arbitration. According to that rule, there should have been five arbitrators, of whom the three whose names were first drawn by lot were to act on each particular occasion, and in case of vacancies the board of directors were to have power to fill up the places. It appears that originally there were five arbitrators, but two of them had died or retired, and at the date of the writ there were only three. While that was so, on October 24, 1894, the defendants took out a summons that all proceedings in the action might be stayed, and all disputes between the plaintiff and defendants referred to arbitration pursuant to rule 77; and on November 12 the order which I have read was made. It was not till after that date that two new arbitrators were appointed, bringing the total number up to five. That was done after Day, J., had made the order which is appealed from, but before the proceedings by appeal in this Court. The appeal is based on the ground that there was no tribunal capable of determining the dispute between the parties by arbitration at the date of the writ, and that it was not competent for the society to appoint arbitrators subsequent to that date; and reliance was placed on the decision of North, J., in *Christie* v. *Northern Counties Benefit Building Society*. (1) This society is governed by the provisions of the Building Societies Act, 1874 (37 & 38 Vict. c. 42). The Act has been judicially construed in more cases than one, and I cannot read *Wright* v. *Monarch Investment Building Society* (2), *Municipal Permanent Investment Building Society* v. *Kent* (3), and *Hack* v. *London Provident Building Society* (4), without seeing that the construction which we are asked to put upon the Act would be inconsistent with its general scope, which is, that under such circumstances as the present, parties should not come to the High Court of Justice at all. There are various modes provided by the Act for settling disputes. Sect. 16 enacts that the rules of any society shall set forth among other things (sub-s. 9), "whether disputes between the society and any of its members or any person claiming by or through any member or under the rules shall be settled

(1) 43 Ch. D. 62.
(2) 5 Ch. D. 726.
(3) 9 App. Cas. 260.
(4) 23 Ch. D. 103.

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Lindley, L.J.

by reference to the court" (the court there being, by s. 4, the county court) "or to the registrar or to arbitration." In the present case, the rules state that disputes are to be settled by arbitration. The decisions to which I have referred establish that where the rules of a society state that the disputes are to be referred to arbitration, that is the only tribunal capable of settling such disputes. The cases above mentioned would be precisely in point here if, at the time when the writ was issued, there had been five arbitrators. But it is said that as there were not five then, an action in the High Court would lie. North, J., appears to have taken that view in *Christie* v. *Northern Counties Benefit Building Society* (1), on which the appellant relies; but the arguments in that case appear to have been principally directed to other points. There seem to me to be two passages in his judgment which are open to criticism. At p. 68 he says: "At the time when the writ was issued the dispute could not be settled by arbitration because there were no arbitrators to whom it could be referred, and it is impossible for me to say that it was not open to the plaintiff to issue a writ, for if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all." I think that is a mistake. The remedy would be by way of mandamus to compel the society to appoint arbitrators. Then he goes on to say (at p. 69): "In my opinion the tribunal contemplated by the rule to decide a dispute between a member and the society is to consist of three persons to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons, three of whom are to be the judges of the dispute. It is quite true that these gentlemen were appointed at a general meeting; but it was a general meeting of the members of the society, who are the defendants. The general meeting would, in all probability, adopt the persons whose names were submitted to it, and those persons would have been nominated by somebody. It is sufficient to prevent my sending the matter to such a tribunal that these gentlemen may have been nominated by the committee or the directors, or some of them,

(1) 43 Ch. D. 62.

expressly because they or some or one of them are or is known to hold a particular view on this subject." Then he says that he sees no reason for doubting that the persons appointed were honest and impartial men, but that still they may have been selected because of their known views on the subject.

North, J., seems to have thought that it was not fair after the dispute had arisen for the society to appoint its own tribunal. Let us see how that stands in the present case. It is clear from the correspondence that the quarrel had been in existence for some time. The counsel for the appellant did not go so far as to contend that any objection could have been made if the two new arbitrators had been appointed just before the writ was issued. What magic is there in the actual date of appointment? It does not matter whether the tribunal is appointed a day or two sooner or later. Of course, if there is anything improper in the appointment that is a different question. When once we get to the principle on which the Act is based—namely, that the High Court is not intended to interfere in these disputes, but the tribunal nominated under the society's rules is—then the conclusion arrived at by North, J., cannot, in my opinion, be supported. The proper course would have been, instead of commencing an action, to apply for a mandamus, calling upon the society to appoint the necessary arbitrators. In my opinion, the appeal fails, and must be dismissed with costs.

A. L. SMITH, L.J. I am of the same opinion. [The learned judge then referred to the facts as stated above, and continued:—]

The first point taken on behalf of the defendants, the building society, who have obtained a stay of proceedings in the action, is that by the Building Societies Act, 1874, by which the Court and the society and its members are bound, it is in effect provided that no action shall be brought against the society by a member; and ss. 16 and 36 are referred to on that point. In my opinion it is settled that this is so by the decision in the House of Lords in the *Municipal Permanent Investment Building Society* v. *Kent* (1), in which it was expressly held that no such action could be brought in the High Court. In that case Lord

(1) 9 App. Cas. 260.

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Blackburn and Lord Watson held that *Wright* v. *Monarch Investment Building Society* (1), decided by Sir G. Jessel, M.R., and *Hack* v. *London Provident Building Society* (2), decided by Sir G. Jessel, M.R., and Lindley, L.J., were rightly decided. That being the law, when the writ was issued the defendant building society made an application for a stay of proceedings. The answer set up by the plaintiff was that, although it had been decided in those cases that the jurisdiction of the High Court was ousted by the substitution of another tribunal, those decisions were subject to this, that there must be some tribunal other than the High Court to which the plaintiff could go; and that here there was no such tribunal, because at the time when the writ was issued the tribunal provided by the rules of the society did not exist. Now, s. 16, sub-s. 9, of the Building Societies Act, 1874, requires the rules to state whether disputes shall be settled by the county court or by the registrar, or by arbitration; and s. 34 enacts that where the rules direct disputes to be referred to arbitration, arbitrators shall be named and elected of whom a certain number, not less than three, shall be chosen by ballot to act in each case of dispute. The rules of the society in this case required the existence of five; but at the time when the writ was issued there were only three. It is said that there was, therefore, no proper tribunal, and that the society had no power to fill up the number of arbitrators for the purpose of trying the questions in dispute between the plaintiff and the society; and in support of this contention the case of *Christie* v. *Northern Counties Benefit Building Society* (3), before North, J., was relied on, in which that learned judge held, in a case similar to the present, that there was no power to fill up the requisite number of arbitrators after the writ was issued. No doubt the learned judge did so decide; but the point which was argued before us was not argued before him—namely, that the intention of the Act was to prevent actions being brought against the society at all in the High Court. I do not agree with what fell from the learned judge; and I am not by any means sure that if the case had been argued before him in

(1) 5 Ch. D. 726. (2) 23 Ch. D. 103.
(3) 43 Ch. D. 62.

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the same way as it has been argued before us he would have arrived at the conclusion at which he did. The main point argued before him was whether a member was bound by the new rules.

Looking at the statute and the decisions culminating in that of the House of Lords, the only tribunal for the plaintiff to go to in a dispute like the present is the board of arbitrators, and if that be incomplete the only remedy is to apply to the Court for a mandamus to compel the society to fill up the requisite number. It was conceded that if the vacancies had been filled up by the society a day before the writ was issued, even though they knew what the question pending between them and the member was, it would have been sufficient. It cannot, in my opinion, make any difference whether this was done the day before or the day after the writ was issued. The order of Day, J., was, in my opinion, right, and the appeal must be dismissed with costs.

A. L. Smith, L.J.

Appeal dismissed.

Solicitors: *Smith, Fawdon, & Low, for Becke & Green, Northampton; Ford, Lloyd, Bartlett, & Michelmore.*

M. W.

[IN THE COURT OF APPEAL.]

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KITTS *v.* MOORE.

Arbitration—Staying Proceedings—Injunction—Action impeaching Agreement—Jurisdiction—Equitable Grounds—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

The Court has jurisdiction to interfere by injunction, on equitable grounds, to restrain the defendant from proceeding to arbitration where an action has been brought impeaching the instrument containing the agreement for reference.

Sect. 25, sub-s. 8, of the Judicature Act, 1873, has not enlarged the jurisdiction of the Court so as to enable it to grant an injunction where, before the Act, it could not have done so.

North London Ry. Co. v. *Great Northern Ry. Co.* (11 Q. B. D. 30) approved of and distinguished.

APPEAL from an order of Lord Russell of Killowen, C.J., sitting as vacation judge.

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KITTS v. MOORE.

In the month of June, 1893, the plaintiff, Richard Kitts, a hay importer of London, and the defendants, William Moore & Co., a firm of corn merchants in Liverpool, entered into a joint speculation in a cargo of 1000 to 1500 tons of hay, under an alleged agreement between the parties, consisting of a series of telegrams and letters that passed between them, commencing on June 13, 1893, and culminating in a formal contract or "sold note" of June 15, 1893, under which the cargo was purported to be sold by the defendants to the plaintiff at the price of 100*s.* per ton, subject to the printed rules of the Liverpool Corn Trade Association, Limited. One of these rules provided that all disputes arising out of transactions connected with the trade should be referred to two arbitrators, one to be chosen by each party in difference, such arbitrators being empowered to call in a third in case they should deem it necessary, or, in the case of either party refusing to appoint an arbitrator, the matter should, on the application of the other party, be referred to two arbitrators to be nominated by the president or vice-president of the association. The sold note was sent to the plaintiff by the defendants with a letter of June 19, 1893, stating, "It is understood and hereby agreed that we take one half joint interest with yourself in this cargo," and the plaintiff wrote in reply confirming the "contract." The plaintiff's view was that the contract purporting to be completed by the sold note of June 15, 1893, by the defendants' letter of June 19 accompanying it, and by his, the plaintiff's, letter of acceptance, was not in fact one of purchase by him, but was one of partnership. Disputes subsequently arose in reference to the accounts furnished by the defendants to the plaintiff of freight and expenses in connection with the discharge of the cargo on its arrival, and it appeared in particular that the defendants had, unknown to the plaintiff, themselves bought the cargo at 95*s.* per ton under a contract dated the day prior to the date of the sold note under which they sold the cargo to the plaintiffs, thus making a profit of 5*s.* per ton, which they claimed to be entitled to retain for themselves. In consequence of these disputes the defendants, on September 15, 1894, wrote to the plaintiff claiming arbitration, and naming their arbitrator, at the same time

requesting the plaintiff to name his. In reply the plaintiff wrote on the 18th that he proposed having the disputes decided by the Court, and on the 28th he issued the writ in this action, claiming (1.) a declaration that a partnership existed between himself and the defendants in respect of the cargo of hay "purchased by the defendants on behalf of themselves and the plaintiff" in June, 1893; (2.) an account of all moneys received by the defendants belonging to the said partnership; (3.) Payment of what should be found due to the plaintiff on such account; and (4.) "an injunction restraining the defendants from proceeding or attempting to proceed with any arbitration having reference to any disputes between the plaintiff and defendants in respect of the said cargo or the said partnership."

The president of the Liverpool Corn Trade Association having, upon the application of the defendants, appointed two arbitrators, those arbitrators, on October 2, sent to the plaintiff a notice in writing of their intention to proceed with the arbitration on October 8. Thereupon the plaintiff served the defendants with notice of motion before the vacation judge for an interim injunction to restrain them from proceeding to arbitration. In his affidavit in support of the motion the plaintiff stated that, with reference to the sold note and his letter of acceptance of it, it was never contemplated between the defendants and himself that there should be a contract between them under which he was to purchase the hay, neither was it ever contemplated that there should be any delivery to him as a purchaser: that no delivery had ever been made, tendered or required; and that under those circumstances no dispute could possibly arise necessitating an arbitration, and no dispute existed between the defendants and himself under or in respect of such documents; that at the time he received such documents he looked upon them as being merely confirmatory of the partnership arrangement already existing between them, and not in any way as imposing or introducing new conditions with reference thereto; and he claimed that such documents were, in fact, meaningless and had no material reference to or bearing upon such partnership. The affidavit further stated that the dispute between the defendants and himself appeared by the indorsement upon the

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writ of summons, and was, as he was advised and believed, a proper one to be heard and determined by the Court; the main question to be decided being whether the defendants were entitled, as they claimed to be, to make a secret profit in a partnership transaction, which, he said, they had always admitted existed between them and himself; and he desired that such question, together with the other claims mentioned in the writ, should be decided by the Court and not by arbitrators.

The motion came on before Lord Russell of Killowen, C.J., sitting as vacation judge, who made an order granting an injunction until the trial. The defendants appealed.

Nov. 9. *T. Willes Chitty*, for the defendants. First, it is contrary to the established practice of the Court to restrain an arbitration merely on the ground that it will be futile; and the practice has not been altered by s. 25 of the Judicature Act, 1873. The test is, will the plaintiff suffer some legal injury if the arbitration is allowed to proceed? *North London Ry. Co.* v. *Great Northern Ry. Co.* (1); *London and Blackwall Ry. Co.* v. *Cross* (2); *Farrar* v. *Cooper* (3); *Wood* v. *Lillies* (4); *Jackson* v. *Barry Ry. Co.* (5) In *Monson* v. *Tussauds, Limited* (6), Lord Halsbury doubted whether the Judicature Act, 1873, had not enlarged the jurisdiction of the Court; but he was the only member of the Court who expressed that doubt.

Secondly, assuming the existence of the jurisdiction, this is not a proper case for its exercise.

Marten, Q.C., and *Stokes*, for the plaintiff. Wherever there is an action brought to set aside or rectify a document constituting an agreement for reference to arbitration, the Court has jurisdiction to interfere by injunction to restrain one of the parties from proceeding to the reference; for an agreement for reference is merely a consensual agreement, and therefore, if the contract between the parties is set aside altogether, there can be no reference, and the matter is at an end. The grounds on which the Court will exercise its jurisdiction in such cases is shewn in

(1) 11 Q. B. D. 30.
(2) 31 Ch. D. 354.
(3) 44 Ch. D. 323.
(4) 61 L. J. (Ch.) 158.
(5) [1893] 1 Ch. 238, 246.
(6) [1894] 1 Q. B. 671.

Mylne v. *Dickinson* (1), which is treated as good law at the present day: Russell on Arbitration (7th ed. p. 204). The jurisdiction to interfere by injunction to restrain proceeding to arbitration on equitable grounds, where the object of the action was to set aside the agreement for reference, that is, where the agreement itself was impeached, was constantly exercised before the Judicature Act, 1873, especially in compensation cases under s. 68 of the Lands Clauses Consolidation Act, 1845: *South Western Ry. Co.* v. *Coward* (2); *London and North Western Ry. Co.* v. *Smith.* (3)

[LINDLEY, L.J. The latter case has never been followed since *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke.* (4)]

Gattke's Case (4) did not overrule *Smith's Case* (3), but distinguished it. The principle of *Smith's Case* (3)—that where there is a general question of law affecting other persons besides the claimant for compensation under s. 68, the Court has jurisdiction to interfere by injunction—still holds good (5). Lord Truro's decision in that case, therefore, does not affect the position for which the plaintiff contends. *Coward's Case* (2) and *Smith's Case* (3) are both discussed in *Maunsell* v. *Midland Great Western (Ireland) Ry. Co.* (6), where Wood, V.C., also points out that, on the question of convenience or inconvenience, no practical inconvenience will arise from suspending the reference until the determination of what the agreement between the parties really is. Other instances of the exercise of the jurisdiction, where the agreement is impeached, are *Witt* v. *Corcoran* (7), *Sissons* v. *Oates* (8), and *Malmesbury Ry. Co.* v. *Budd.* (9) The Judicature Act, 1873, has not altered the jurisdiction, but only the procedure: *North London Ry. Co.* v. *Great Northern Ry. Co.* (10) In that case, which was cited as an authority that the Court will not restrain arbitration proceedings, the agreement itself was

(1) G. Cooper, 195.
(2) 5 Rail. Cas. 703.
(3) 5 Rail. Cas. 716; 1 Mac. & G. 216.
(4) 3 Mac. & G. 155.
(5) 3 Mac. & G. 167–8, 174.
(6) 1 H. & M. 130, 148, 150, 151.
(7) Law Rep. 8 Ch. 476, n.
(8) 10 Times L. R. 392.
(9) 2 Ch. D. 113.
(10) 11 Q. B. D. 30, 36.

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not impeached—an important distinction. So in *Farrar* v. *Cooper* (1).

London and Blackwall Ry. Co. v. *Cross* (2) is distinguishable. That was a case of a person bonâ fide asserting himself to be the agent of another in legal proceedings; and it was held that there was no general right to grant an injunction in such a case. The Court will, however, interfere in a case where A. is passing off his goods as the goods of B., because there are equitable grounds for the interference. *Cross's Case* (2), therefore, stands clear of cases in which there are equitable grounds for interference. *Wood* v. *Lillies* (3) merely decided that the circumstance that the arbitration will be futile and vexatious affords no sufficient ground for an injunction.

[LINDLEY, L.J. There was nothing there but inutility and vexation.]

What matters in dispute are within the agreement for arbitration is a question which the Court will itself decide, and not leave to the arbitrator: *Piercy* v. *Young.* (4)

In the present case the plaintiff disputes the validity of the sold note, on the ground that it does not shew the real intention of the parties; and therefore, until that question is decided, the Court will restrain proceeding to arbitration under the agreement for reference contained in it. In the second place it is contended that the joint adventure was a matter quite independent of the sold note, and contained no agreement for reference. A third point is, that a partner cannot make a secret profit out of the partnership business, as has been done here: *Bentley* v. *Craven* (5); Partnership Act, 1890, s. 29, sub-s. 1.

[LINDLEY, L.J. Our only difficulty is about the state of the authorities upon the question of jurisdiction.]

T. Willes Chitty, in reply. First, the claim here is, not to rectify an agreement, but merely for a declaration that a partnership exists. Secondly, the plaintiff can get all the relief he asks by arbitration. Thirdly, there is nothing to compel the plaintiff to go on with his action, and he may delay the arbitration

(1) 44 Ch. D. 323.
(2) 31 Ch. D. 354.
(3) 61 L. J. (Ch.) 158.
(4) 14 Ch. D. 200, 208.
(5) 18 Beav. 75.

indefinitely, notwithstanding that it was commenced before the action. Fourthly, no fraud is alleged against the defendants. The sole question is as to the meaning of the contract constituted by the sold note and the letter of June 19. The rule, as settled by the authorities, is, that the Court will not stay an arbitration except on the ground of some legal injury. The mere fact that it may be futile is no ground for staying it; but if, for instance, corruption on the part of the arbitrator is shewn, no doubt an injunction will be granted.

LINDLEY, L.J. The question raised on this appeal is one of some practical importance, and not altogether free from difficulty. The plaintiff and the defendants have entered into a speculation in hay, and they have disagreed about the mode in which the accounts between them are to be adjusted. The agreement between them is contained in a series of documents commencing on June 13, 1893; and amongst those documents there is what is called a "sold note," which has given rise to all this difficulty. The defendant has adopted, as business men very often do, a printed form wholly inapplicable to the case. The parties have used the printed form as if the transaction was a sale instead of an adventure such as they entered into. The printed form refers to the printed rules of the Liverpool Corn Trade Association, and the plaintiff has acknowledged the receipt of the "contract." Now, there is a dispute as to whether the hay in question is to be invoiced to the firm (a sale is out of the question: there is no sale in the matter) at 100*s.*, or at 95*s.* The defendant says: "We must refer that to arbitration." The plaintiff says: "No; I shall not refer it to arbitration; I shall bring an action to have our rights determined, and I shall impeach the agreement upon which you rely. That printed document upon which you rely I shall ask the Court to say does not contain the true agreement between us." Under those circumstances, the plaintiff brings an action for an ordinary partnership account, and asks for an injunction to restrain the arbitration proceedings: and he does so upon the footing that the agreement which contains the arbitration clause is, for some reason, not binding—whether for fraud, or mistake, or surprise, or for

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some other reason I do not say, because the statement of claim has not been launched: but his equity is to impeach that agreement. Then he says Courts of Equity have always granted an injunction to restrain a reference to arbitration under an agreement which is impeached until the right to impeach it has been determined. That this is a right statement of what was the practice of the Courts of Equity before the Judicature Act is shewn by the cases of *Mylne* v. *Dickinson* (1), *South Western Ry. Co.* v. *Coward* (2), and *Maunsell* v. *Midland Great Western (Ireland) Ry. Co.* (3); in all of which cases the Court of Chancery did grant an injunction to stay a reference to arbitration upon the ground that the agreement containing the arbitration clause was impeached.

Now, is there anything to alter this practice or to render it incumbent upon us to depart from it? We have been pressed by the defendants with the case of *North London Ry. Co.* v. *Great Northern Ry. Co.* (4), and with *London and Blackwall Ry. Co.* v. *Cross* (5), and also with the cases of *Farrar* v. *Cooper* (6) and *Wood* v. *Lillies* (7), which were decided by Kekewich, J., and Chitty, J. Those cases, however, do not touch the principle upon which I am proceeding. The most important case is the one I mentioned first—*North London Ry. Co.* v. *Great Northern Ry. Co.* (4)—in which there was an agreement to refer. One party wanted to refer, and the other did not, and he brought an action to stop the reference. There was no impeaching the agreement; there was nothing of the kind: there was no more ground in that case for stopping the arbitration than there would have been for stopping an action because it was a frivolous one. The Master of the Rolls and Cotton, L.J., in their judgments, said that the Courts of Equity never did such a thing, and they held—and this was the important part of the decision—that the 25th section of the Judicature Act had not extended the jurisdiction to enable them to do it. That was the decision. They never meant to say that in cases where the Court of Equity used to interfere the

(1) G. Cooper, 195.
(2) 5 Rail. Cas. 703.
(3) 1 H. & M. 130.
(4) 11 Q. B. D. 30.
(5) 31 Ch. D. 354.
(6) 44 Ch. D. 323.
(7) 61 L. J. (Ch.) 158.

power was gone. Whether the Appeal Court has taken too narrow a view of or placed too narrow a construction upon the 25th section is another matter altogether: I do not consider I am at liberty to discuss the question. The Court has put a construction upon the section, and by that construction I am bound. That case does not touch the principle, and I protest altogether against being thought to fritter away a case which I am bound to follow.

Cross's Case (1) was a case under the Lands Clauses Act, and it amounts really to this—that, notwithstanding the 25th section of the Judicature Act, the Court will not alter the practice which has prevailed under the Lands Clauses Act since it was settled by Lord Truro more than forty years ago. When Lord Truro decided *Gattke's Case* (2) there was a considerable difference of opinion. There were great inconveniences either way. The inconveniences were pointed out by him, and they were pointed out also by Lord Cottenham, who thought the best way was to allow a person to bring an action or file a bill, and have his rights determined before the arbitration. Lord Truro thought that way was inconvenient, and that the best way under the Lands Clauses Act was to let the parties have an arbitration and get their rights determined. That was settled more than forty years ago; and what we said in the case of *London and Blackwall Ry. Co.* v. *Cross* (1) was that, notwithstanding the 25th section of the Judicature Act, we should not alter but would stand by the practice as it had been settled in the case of *East and West India Docks, &c.* v. *Gattke.* (2) There is no single case which in any way curtails the power of this Court to stop an arbitration founded upon an agreement which is impeached. I think, therefore, that the Lord Chief Justice took a correct view, and that this appeal ought to be dismissed. Of course the injunction will only be, as the Lord Chief Justice has worded it, until the trial.

A. L. SMITH, L.J. This is an appeal from the judgment of the Lord Chief Justice, who granted an injunction against the defendants to restrain them from proceeding further with an

(1) 31 Ch. D. 354. (2) 3 Mac. & G. 155.

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arbitration, as they were proposing to do, until after the trial of an issue which has been raised between the plaintiff and the defendants.

The real question is whether we are bound by authority to say that the Lord Chief Justice could not grant that injunction, for I have not the slightest doubt, as a matter of convenience, that the proper thing is to stay this arbitration until the issue in dispute between the plaintiff and the defendants has been adjudicated upon.

At one time, before fully understanding the facts, I was of a contrary opinion; but I am now satisfied that there is a real controversy here between the parties as to whether or not the printed document—which is the only document containing the arbitration clause—does or does not indicate the real and true position between the plaintiff and the defendants, which is whether this hay is to be placed on joint account at the price of 100*s.* or of 95*s.* a ton, for if that document is left to stand unimpeached the plaintiff's case goes by the board, because it is expressly stated therein that it is to be placed at 100*s.* a ton. The plaintiff brings his action for the purpose of impeaching that agreement, though the defendants had, before the plaintiff brought his action, commenced proceedings by way of arbitration. The plaintiff then went to the Lord Chief Justice to stay the arbitration, and the Lord Chief Justice came to the conclusion —I use words upon which a great deal has already heretofore been said—that it was just and convenient that this should be done. Whereupon it is argued that this was wrong, because it is said that in the case of *North London Ry. Co.* v. *Great Northern Ry. Co.* (1), this Court had held, that under no conceivable circumstances has the Court jurisdiction to stay by injunction proceedings by arbitration. In my opinion, that statement of the effect of that decision is too large. The point which there came up for adjudication was whether or not s. 25, sub-s. 8, of the Judicature Act, 1873—which enacts that an injunction may be granted when the Court thinks it just and convenient—had enlarged the jurisdiction which the Courts of Equity had theretofore exercised; and upon that point this Court undoubtedly

(1) 11 Q. B. D. 30.

held that, where a litigant could not obtain an injunction from a Court of Equity prior to the Judicature Act, 1873, he could not obtain one now. On reading that case, it is clear that this was the ratio decidendi. In that case there was no question of impeaching the agreement for arbitration: the sole ground taken was that the Court should, by injunction, stay the arbitration, because there was nothing to be arbitrated upon, and the arbitration would be futile and useless. The Court held that, inasmuch as before the Judicature Act, 1873, this was no reason for staying arbitration proceedings, so it was no ground for staying them in that case. The counsel for the plaintiff accept this, and in no way cavil at it, nor could they do so; but they contend that, prior to the passing of the Judicature Act, the decisions of the Court of Equity shewed that where a litigant was seeking to impeach a document which contained an arbitration clause, jurisdiction was entertained by the Court of Equity to grant an injunction when it thought it right to do so. The two main cases which, amongst others, they produced were—*Mylne* v. *Dickinson* (1), before Lord Eldon in 1815, and *Maunsell* v. *Midland Great Western (Ireland) Ry. Co.* (2), before Wood, V.-C., in 1863. In the latter case, which I will take by way of example, there was an agreement to refer, and an injunction was asked for by one of the parties to restrain proceedings by arbitration, on the ground that the directors of the defendant company had been acting ultrà vires. If the point had been that the agreement had been entered into by the directors on behalf of the shareholders intrà vires, and they wanted to get rid of the arbitration on the ground of its being useless and futile, no injunction would have gone; but as the shareholders, who were the plaintiffs, impeached the agreement, because they alleged that the agreement was ultrà vires the directors and consequently they were not bound by it and not bound by the proceedings on arbitration, the Court granted the injunction until the proceedings in Equity were taken to determine whether the agreement to refer could be successfully impeached or not. *South Western Ry. Co.* v. *Coward* (3) was another case which proceeded on the same principle.

(1) G. Cooper, 195. (2) 1 H. & M. 130.
(3) 5 Rail. Cas. 703.

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Loyally following the case of *North London Ry. Co.* v. *Great Northern Ry. Co.* (1) and adopting it, I say this case is not covered by that case, because, in that case, there was no pretence for saying that anybody was impeaching the agreement. Mr. Marten has satisfied me that the practice of the Court of Chancery was to grant injunctions under the circumstances of this case prior to the Judicature Act. I do not think anyone would argue that s. 25 of the Judicature Act, 1873, was intended to curtail the jurisdiction of the Court. The contrary was argued in *Monson* v. *Tussauds, Limited* (2), in which case Lord Halsbury appeared to have been of opinion that the Judicature Act was intended to enlarge the jurisdiction; but that opinion, at present at any rate, stands by itself. I have already said that, if there was jurisdiction, I think it ought to be exercised, and for these reasons alone I refuse to overrule the Lord Chief Justice in this case, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Pritchard, Englefield & Co.*
Solicitors for respondent: *Woodward & Hood.*

(1) 11 Q. B. D. 30.

(2) [1894] 1 Q. B. 671.

G. I. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 23.

D. OWEN & CO. *v.* CRONK.

Principal and Agent—Personal Liability of Agent—Money obtained for Principal by Duress—Payment by Agent to Principal before Notice of Duress—Receiver appointed under Debenture Trust Deed.

A trading company executed a trust deed to secure the payment of debentures issued by them. The deed empowered the trustees, on the happening of certain events, to enter into possession of the property therein comprised, and to carry on the company's business; to appoint managers, clerks, &c.; and to use the name of the company. It was also provided that, at any time after the right of the trustees to enter upon the mortgaged premises should have arisen, they might appoint a receiver of the property thereby charged, in like manner as if the trustees were mortgagees within the meaning of the Conveyancing Act, 1881. Every receiver so appointed was to have all the powers conferred by that Act, and, in particular, power to exercise any of the powers previously by the deed conferred upon the trustees, and he was to be deemed to be the agent of the company, and as such to be in the same position as a receiver duly appointed by a mortgagee under the Conveyancing Act, 1881:—

Held, that a receiver appointed by the trustees under this deed, and carrying on the company's business in their name, was a mere agent, and that in so doing he did not incur any personal liability.

The defendant was appointed by the trustees to be receiver, and he carried on the business in the company's name. He opened an account at a bank in the company's name, his own name being added as receiver, and to this account he paid all moneys which he received in the course of the business. The manager of the business, without the knowledge of the defendant, compelled the plaintiffs, under "duress of goods," to pay a sum which the plaintiffs alleged to be extortionate for work which the company had done for them. The money thus obtained was handed over to the defendant as receiver, and was paid by him to the account which he had opened, before he had any notice of the duress:—

Held, that the payment into the bank was a payment by the defendant as agent to his principals, and that, as it was made before he had any notice of the extortion, he was not personally liable to the plaintiffs.

Buller v. *Harrison* (Cowp. 565) distinguished.

APPEAL by the plaintiffs against the judgment of Charles, J., at the trial of the action without a jury.

The action was brought to recover, as money received by the defendant for the use of the plaintiffs, a sum of 215*l.* 6*s.*, which they alleged that they had paid to the defendant, under "duress of goods" and under protest, for the purpose of obtaining

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possession of some type and plant belonging to them, which had been wrongfully detained by the defendant.

The defendant was the receiver, appointed under the provisions of a trust deed, dated May 24, 1892, executed by a company called Judd & Co., Limited, which carried on the business of printers, to secure the payment of some mortgage debentures to the amount of 8000*l.*, which had been issued by them. This deed was made between the company of the one part, and the Debenture Corporation, Limited (thereinafter called the trustees) of the other part, and by it the company, as beneficial owners, demised unto the trustees certain leasehold hereditaments specified in the first schedule, to hold the same unto the trustees for all the respective residues then unexpired of the several terms for which the same premises were respectively granted by the several indentures of lease mentioned in the first schedule, except the last day of each of the said terms, but subject to the principal money and interest secured by a set of first mortgage debentures for 42,000*l.* previously issued by the company, and to the powers and provisions contained in a trust deed, dated October 13, 1891, for securing those first debentures. The company also, as beneficial owners, conveyed unto the trustees all the business and undertaking of the company, and all its present and future book debts, letters patent, assets, and real and personal property not already thereinbefore demised, except personal chattels within the meaning of the Bills of Sale Acts, 1878 and 1882, to hold the same unto the use of the trustees, their successors and assigns, but subject to the principal money and interest secured by the first debentures, and to the powers and provisions of the first trust deed. The mortgaged premises were to be held by the trustees as security for the payment of the principal money and interest secured by the second debentures, and subject as aforesaid the mortgaged premises were to be held by the trustees upon trust to permit the company and its assigns to hold and enjoy the mortgaged premises, and to carry on therein and therewith the business authorized by the memorandum of association of the company, until the happening of some or one of the events upon which the security thereby constituted should as therein mentioned

become enforceable, and then upon trust that the trustees might in their discretion enter upon and take possession of the mortgaged premises, or any part thereof, and sell, call in, collect and convert into money the same or any part thereof. By clause 10, after the trustees should have made such entry as aforesaid, and until the whole of the mortgaged premises should be sold, called in, collected and converted into money under the primary trust for conversion, the trustees should, so far as might be allowed by law, have power (as and when they should think fit) (inter alia) to carry on the business of the company; to appoint managers, officers, agents, accountants, clerks, servants, workmen and others for the aforesaid purposes, upon such terms as to remuneration or otherwise as the trustees might think proper; to give valid receipts for all moneys; and to use the name of the company for all or any of the purposes aforesaid and in any legal proceedings. By clause 11, at any time after the right of the trustees to enter upon the mortgaged premises should have arisen, the trustees might in their discretion, by writing under their seal, appoint one or more person or persons to be a receiver or receivers of all or any part of the property thereby charged, in like manner in every respect as if the trustees were mortgagees within the meaning of the Conveyancing Act, 1881, and had become entitled under that Act to exercise the power of sale thereby conferred, and every receiver so appointed should have and be entitled to exercise all powers conferred by the said Act, as if such receiver had been duly appointed thereunder, and in particular (by way of addition to but without thereby limiting any general powers thereinbefore referred to) every such receiver so appointed should have power to take immediate possession of the mortgaged premises, or any part thereof, and to exercise any of the powers conferred by the clause lastly thereinbefore contained upon the trustees, and also power to sell all or any part of the mortgaged premises. By clause 14, "the trustees shall not, nor shall any receiver or receivers appointed as aforesaid, by reason of the receiver or receivers entering into possession of the mortgaged premises, or any part thereof, be liable to account as mortgagee or mortgagees in possession, or for anything except actual receipts, or be liable

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for any loss on realization, or for any default or omission for which a mortgagee in possession might be liable, but every receiver duly appointed by the trustees under the power in that behalf hereinbefore contained shall be deemed to be the agent of the company, and shall as such agent for all purposes be deemed to be in the same position as a receiver duly appointed by a mortgagee under the Conveyancing Act, 1881, and the trustees and every such receiver shall be entitled to all the rights, powers, privileges, and immunities by the said Act conferred on mortgagees and receivers duly appointed under that Act."

On December 9, 1892, events having happened which entitled the Debenture Corporation under the provisions of the trust deed to appoint a receiver, they, by an instrument in writing under their seal, appointed the defendant "to be receiver of all the mortgaged premises referred to in and charged by" the deed of May 24, 1892, "and of all the premises referred to in and charged by the second mortgage debentures, and to exercise all the powers which, by the said indenture and second mortgage debentures, are given to the receiver so appointed." The defendant at once took possession as receiver of the mortgaged property, and proceeded to carry on the business of the company. The defendant also for the purposes of the business opened an account at a bank in the name of "Judd & Co., Limited, Sidney Cronk, receiver," and to this account he paid the moneys which he received on behalf of the business. The manager of the company's printing business had been a Mr. Macintosh, and the defendant continued to employ him as manager just as he had been employed before, and paid his salary.

The plaintiffs were the printers and proprietors of some railway time-tables, which were published monthly. In June, 1893, their printing works were damaged by fire, and they arranged with Macintosh, as manager of Judd & Co.'s business, that the time-tables should be printed at the works of Judd & Co., while the plaintiffs were unable to do the printing themselves. To enable Judd & Co. to do the printing, the plaintiffs sent to their works some special blocks and type belonging to them. Early

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in August, 1893, the defendant delivered to the plaintiffs an account for the printing of the July time-tables. This account amounted to 517*l.* 16*s.* The plaintiffs considered that the sum charged was excessive, but they gave Macintosh a cheque for 250*l.* on account. The cheque was made payable to the order of Judd & Co., Limited. The cheque was handed over to the defendant as receiver, and he indorsed it "Judd & Co. (Limited) per pro. Sidney Cronk, receiver," and paid it into his receivership account. The plaintiffs demanded from Macintosh an abatement of the account; but he declined to allow any reduction. They then said that they must take away their printing business from Judd & Co., and they made arrangements with another firm to do the work for them. They requested Macintosh to deliver up their type and blocks; but he declined to do so unless the whole of the account was paid. The plaintiffs than consulted their solicitor, and he, on August 23, called at the works of Judd & Co. and had an interview with Macintosh. He told Macintosh that he was instructed to tender him 67*l.* in settlement of the account. Macintosh declined to accept the tender, and said that he would not deliver up the plaintiffs' type and blocks unless the full amount of the account was paid. The solicitor thereupon, as the plaintiffs required their type and blocks for immediate use, paid the full balance of the account to Macintosh under protest, and the type and blocks were then given up to the plaintiffs. The payment was made by a cheque drawn to the order of Judd & Co., Limited. This cheque was handed by Macintosh to the defendant, who indorsed it "Judd & Co. (Limited), Sidney Cronk, receiver," and then paid it into his receivership account. The defendant did not know until after he had done this that the payment had been made by the plaintiffs' solicitor to Macintosh under protest, or that Macintosh had refused to deliver up the plaintiffs' goods unless the payment was made.

This action was brought to recover the sum of 215*l.* 6*s.*, which the plaintiffs alleged to be an excessive charge.

Charles, J., held that, assuming the payment to have been excessive, the defendant was a mere agent, and that, as he had paid over the money to his principals before he had any notice

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of the circumstances under which the payment was made, he was not personally liable to the plaintiffs.

The learned judge accordingly gave judgment for the defendant.

The plaintiffs appealed.

Lawson Walton, Q.C., W. R. Benson, and *Foà,* for the plaintiffs. The defendant was in the position of a trustee carrying on the business for the debenture-holders, who were his cestuis que trust. He was bound to account to them; but, as regarded the persons with whom he dealt, the business was his, and he was personally responsible to them. He was liable to them just as the executors or trustees of a will who carry on the testator's business, or as a receiver appointed by the Court, are liable personally to creditors, though they are entitled to be indemnified by the estate. The account to which the defendant paid the moneys which he received was really his own account, and he could deal with it as he pleased. The account was opened for the purpose of ear-marking the money. He could have changed the account at any time, and as regarded third persons the money was his own, though he was bound to account to his cestuis que trust. The plaintiffs could not sue the debenture-holders, whose names they do not even know. From the appointment of the defendant as "receiver" the just inference is that he incurred the same obligations as if he had been a receiver appointed by the Court.

But, if the defendant was a mere agent, he cannot escape liability to the plaintiffs unless he can shew, not only that he was innocent of the duress, but also that before the plaintiffs made their demand he had paid the money over to his principals: *Smith* v. *Sleap.* (1) The defendant cannot shew the latter. After the cheque had been paid to the receivership account the money remained in the defendant's hands and under his control, just as if it had been in his own house. The payment was not such a payment to his principals as will exonerate him from liability to the plaintiffs: *Buller* v. *Harrison.* (2)

(1) 12 M. & W. 585. (2) Cowp. 565.

Dickens, Q.C., and *Reginald Brown*, for the defendant, were not called upon.

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LORD ESHER, M.R. The action is brought to recover from the defendant personally a sum of £215 6*s.* as money had and received by him for the plaintiffs. The ground on which the plaintiffs put their case is this. They say that an account was delivered to them for work done for them by a company called Judd & Co., of whose business the defendant had been appointed receiver; that they considered the amount charged for the work excessive; that they paid or tendered what was properly due, and objected to pay any more, and that they were compelled to pay the rest of the account by reason of goods of theirs being in the possession or under the control of the defendant, and that he refused to give up those goods unless the plaintiffs paid the whole of the account. In legal language, the plaintiffs say that they made the payment under "duress of goods." If it be satisfactorily proved that the defendant refused to give up the plaintiffs' goods unless they paid an exorbitant demand, I think that an action for money had and received can be maintained. The question, therefore, is, whether this allegation is made out as against the defendant. The stress of Mr. Walton's argument lies, I think, in the use of the word "receiver." It has been argued that the defendant stands in the same position as a receiver who is appointed by the Court. When, however, a man is appointed by the Court receiver and to manage a business he knows that he is appointed, and he accepts the appointment, upon the terms that he is to be personally liable to the creditors of that business, and that he will have to account to the Court, while at the same time he will be entitled to an indemnity out of the business. If a man accepts the appointment on those terms there is no difficulty in holding that he is personally liable to the creditors. In the present case, however, the defendant did not accept the appointment of receiver on any such terms; he accepted it upon the terms contained in the debenture trust deed. The company had borrowed money upon debentures, and they had given power to the trustees for the debenture-holders to take possession of the business, not

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Lord Esher, M.R.

as the business of the trustees, but as the business of the company, and to carry on the business, until by means of it they had realized the debt due to the debenture-holders. The trustees accordingly took possession of the business, and carried it on for the benefit of the debenture-holders. They had power to carry on the business in any way they pleased, and they were entitled under the terms of the deed to appoint a receiver of the business, and they accordingly appointed the defendant receiver. The Court did not appoint him. Is there anything in the deed to render him personally liable in respect of a business the carrying on of which could never be of any benefit to himself? He would have to account, not to the Court, but to the persons who appointed him. He was called in the deed a receiver; but he was really an agent. What is the position of such an agent? He is a mere servant. He has, no doubt, great powers; he has, for instance, power to appoint other servants. But such a power is not uncommonly given to an agent or servant. A farm-bailiff often has that power. He has power, too, to order goods in the name of his master, but he is not personally liable to pay for them when so ordered. When he receives money for his master it is his duty to pay it over at once to his master, and, if he mixes it with his own money, he does that which is absolutely wrong. Under this trust deed the trustees appointed the defendant to do for them that which they might have done themselves—to carry on the business of the company. In my opinion, the defendant was the mere agent and servant of the trustees. He had power to appoint other servants; but the moment he appointed them they became, not his servants, but the servants of his masters—the trustees. Macintosh, therefore, was the fellow-servant of the defendant. Under these circumstances an order for printing was given by the plaintiffs to Macintosh. By whom was this work to be done? By the persons who were carrying on the business; that is, the trustees. The defendant did not hold himself out as the person to whom the business belonged; if he had done so he would have rendered himself liable to the plaintiffs, but still the business would not have been his. The plaintiffs' order was, therefore, given to the trustees. What then happened? The printing work was done, and the account

for it was presented to the plaintiffs. They thought the amount charged excessive, and they went, not to the defendant, but to Macintosh, and complained to him that the charge was excessive. He declined to reduce the charge; and when the plaintiffs demanded the return of their type and blocks he refused to give them up until the full amount of the account had been paid. The plaintiffs did not then apply to the defendant. They submitted to Macintosh's demand, and paid the amount under protest in order to obtain their goods. They made the payment by a cheque drawn in favour of Judd & Co. and to their order, that being the name under which the trustees were carrying on the business. The defendant knew nothing then of the circumstances under which the cheque was given. He knew that the bill had been sent in to the plaintiffs, and that they had made a payment on account. The cheque was handed over by Macintosh to the defendant. It was a cheque payable to the order of Judd & Co. Macintosh could not indorse it on behalf of the company, nor could the defendant, unless he had been authorized to do so. He could not indorse it in his own name, nor did he attempt to do so. He indorsed it "Judd & Co. (Limited), Sidney Cronk, receiver." What was the meaning of such an indorsement? It meant, "I am not signing for myself, but for my principals. My signature is not my own so as to make me personally responsible; it is their signature." The cheque was then paid into the bank to the account which had been opened by the defendant in the name of the company, which name the trustees were entitled to use. The bank would not have honoured a cheque drawn upon that account in the name of the defendant; they would only honour a cheque drawn in the name of Judd & Co. by the defendant as receiver. Who, then, had received the money? The defendant had received it, but not so that he could deal with it as his own money. It was his duty to pay it to his principals' account, and he did so pay it, and that was payment to them. He did not know that the cheque had been given under protest until after he had paid it into the bank. So we have an agent receiving money for his principals without any notice that the money has been wrongly obtained, without any knowledge of the extortion, and paying the money over to his principals. It is

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sought to make him personally responsible for the money which he has thus paid over. In my opinion, there is no foundation for the action, and the appeal must be dismissed.

LOPES, L.J. The case is not a difficult one to decide when once the facts are ascertained. It is said that the defendant was a receiver, not a mere servant. Upon the facts, it appears to me that he was an agent, not a principal, and in my opinion the learned judge has come to a right conclusion. The next question is, Had the defendant any knowledge that the money had been improperly obtained from the plaintiffs? In my opinion, there is no evidence that, at the time when the cheque was paid to Macintosh, the defendant knew anything of the circumstances under which the payment was made. The next question is, Did the defendant pay over the cheque to his principals before he had any notice that it had been wrongly obtained from the plaintiffs? The learned judge has come to the conclusion—and I think rightly—that he did. I think the law is clearly settled that if an agent has received for his principal money the payment of which has been wrongly obtained, and he pays it over to the principal before he has any notice of the wrong, he is protected from any liability to the person who paid the money. But if, on the other hand, the agent, with notice of the wrong, pays the money to his principal, he will nevertheless be personally liable to the person who made the payment. Here the defendant, being an agent, paid the cheque to the account of his principals before he had had any notice that it had been improperly obtained from the plaintiffs. He has complied with the requirements of the law, and, therefore, the action cannot be maintained against him, and the decision of the learned judge was right.

RIGBY, L.J. Agreeing as I do entirely with the view taken by my learned brethren of the facts of the case, it is not necessary for me to repeat them. But I wish to notice one or two of the arguments which have been addressed to us. It has been said that, as the defendant is called a receiver, we must be guided by cases which have established the personal liability of

executors or trustees who carry on a business. In my opinion those cases are in no way analogous to the present. Executors or trustees who carry on a business do so on the well-understood terms that they are to be personally responsible to creditors, but are to be entitled to an indemnity out of the estate. So also when a receiver is appointed by the Court to carry on a business, he accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate. The Court cannot carry on the business itself, nor can it be responsible to the creditors. In order that cases of this kind may apply to the present case it must be shewn that the defendant carried on the business of the company upon similar terms. But when we look at the trust deed we find that it contains no such provision. The deed provides that the receiver, though appointed by the mortgagees, shall be deemed to be the agent of the mortgagors. It is said that this applies only as between the mortgagors and the mortgagees; but I do not think it can be so limited. I agree that a man who is a mere agent may, by his acts, make himself personally liable to those with whom he deals; but it is not suggested that there has been any such conduct on the part of the defendant. Nothing, in my opinion, has taken place to make the defendant personally liable to the plaintiffs.

Upon the question whether the payment of the cheque by the defendant to his receivership account was a payment to his principals, *Buller* v. *Harrison* (1) was referred to. In that case there had been nothing but book entries, and it has no application to the present case, in which an actual payment was made by the agent to the credit of the principal.

Appeal dismissed.

Solicitors: *Riddell, Vaizey, & Smith; Linklater & Co.*

(1) Cowp. 565.

W. L. C.

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Dec. 3.

[IN THE COURT OF APPEAL.]

BURT, BOULTON, & HAYWARD *v.* BULL AND ANOTHER.

Principal and Agent—Receiver and Manager appointed by the Court, personal Liability of on Contracts—Construction of Order for Goods signed by Receiver and Manager as such.

The defendants, who were receivers and managers of the business of a company appointed by the Court, gave an order to the plaintiffs for goods required for the purposes of the business. The order, which was in writing signed by the defendants, was expressed to be given for the company, and the words "receivers and managers" were appended to the signatures of the defendants:—

Held, that, when receivers and managers of a business appointed by the Court order goods for the purposes of the business, the inference primâ facie is that they pledge their personal credit for the goods, looking for indemnity to the assets of the business; that there was nothing in the terms of the above-mentioned order to rebut that inference; and that therefore the defendants were personally liable for the price of the goods.

APPEAL from the judgment of Mathew, J., at the trial of the action without a jury.

The action was for the price of timber supplied by the plaintiffs to the defendants. The facts were as follows.

A company called Joseph Bull, Sons & Co., Limited, carried on the business of builders and contractors, the defendant Bull being the managing director of the company. The company had issued mortgage debentures. In May, 1892, the assets of the company consisted of moneys to be received under certain building contracts with the London School Board, contractors' plant, stock-in-trade, and certain book debts. The contracts with the School Board provided for the retention of 10 per cent. of the price of the work until completion, and that, if the work were not proceeded with at such a rate as the School Board architect thought sufficient, the Board could take over the contract and complete the work. A debenture-holders' action had been brought in the Chancery Division, in which the defendant Bull and one Bird were appointed receivers and managers of the business of the company, with liberty to raise a sum of 1000*l.* on the security of the assets of the company in priority to

the securities of the debenture-holders. An order was subsequently made in this action giving the managers power to raise a further sum of 4000*l.* as a first charge on the assets of the company other than the property comprised in certain specific charges. Certain unsecured creditors of the company then presented a petition for the winding up of the company. No order for winding up the company was however made, but an arrangement was come to, by which an order was made by consent that second debentures should be issued to the unsecured creditors of the company to secure the amounts due to them, and one Hobbs should be appointed a receiver and manager in the place of Bird on their behalf. It was further arranged that the sum of 5000*l.* which the receivers and managers were empowered to raise should be advanced by the unsecured creditors and one of the debenture-holders in certain proportions. It appeared that Boulton, one of the members of the plaintiffs' firm, who were unsecured creditors of the company, was a member of a committee, appointed by a meeting of the unsecured creditors, under whose direction the proceedings on behalf of the unsecured creditors were carried on, and that he was aware of the nature of the arrangements come to in the course of those proceedings. Ultimately the defendant Ward, who was a chartered accountant, was appointed by the Court to act as receiver and manager of the business of the company, jointly with the defendant Bull, on behalf of the unsecured creditors, in the place of Hobbs. The defendants, in the course of carrying on the business of the company, subsequently gave the plaintiffs an order for the timber for the price of which the action was brought. The order which was in writing was signed as follows: "For Joseph Bull, Sons & Co., Limited. Receivers and Managers, Edward C. Bull and Robert Jas. Ward." The learned judge gave judgment for the plaintiffs for the amount claimed.

Farwell, Q.C., and *Beven*, for the defendant Bull. The order for the goods in this case does not purport to be given by the defendants in their individual capacity. It states that it is given by them for the company in their capacity as receivers and managers of the company. It is contended that the words

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of the order import that the defendants were not giving the order as individuals on their own personal credit, but in the capacity of managers appointed by the Court. The question is whether, having regard to all the circumstances of the case, the true inference is that the defendants intended to pledge, and the plaintiffs supplied the goods on the personal credit of the defendants, or that the plaintiffs were really content to supply the goods, looking for payment to the fund of 5000*l.* provided for by the order of the Court and the assets of the business. One of the members of the plaintiffs' firm was a member of the committee appointed on behalf of the unsecured creditors of the company, and was cognisant of the proceedings in reference to the appointment of the receivers and the raising of a fund of 5000*l.* It is clear that it was supposed to be in the interest of all the creditors that provision should be made for carrying on the contracts with the School Board, and so earning the retention moneys under those contracts. Under those circumstances the proper inference is that the plaintiffs were content to look to the fund of 5000*l.* and the assets of the company for payment; and that the defendants never intended to pledge, and the plaintiffs never supposed them to be pledging, their personal credit. A receiver and manager appointed by the Court is not bound to pledge his personal credit for the purpose of carrying on the business, and there is no presumption that he intends to do so, when he gives an order. In cases where a trustee or official has the assets of the concern vested in him, the presumption may be that he is intended to pledge his personal credit; but where he has no assets vested in him it is otherwise. See *Redpath* v. *Wigg* (1), where inspectors under an inspectorship deed were held not personally liable. [They also cited *Taylor* v. *Neate* (2); *In re Anglo-Moravian Hungarian Junction Ry. Co., Ex parte Watkin.* (3)]

Upjohn, for the defendant Ward, cited *Sargant* v. *Reed.* (4)

Lawson Walton, Q.C., and *C. A. Russell*, for the plaintiffs. The learned judge has found on ample materials that in point of fact the defendants intended to pledge and the plaintiffs trusted to

(1) Law Rep. 1 Ex. 335.
(2) 39 Ch. D. 538.
(3) 1 Ch. D. 130.
(4) 1 Ch. D. 600.

the defendants' personal credit. It is in each case a question of fact whether that was so, except in so far as the construction of a document may be concerned. But there is nothing on the face of the order in this case that imports that the defendants were not pledging their personal credit. The mere description of themselves as receivers and managers cannot have that effect. It is clear from the language of Jessel, M.R., in *Sargant* v. *Reed* (1), and that of Chitty, J., in *Taylor* v. *Neate* (2), that they both contemplated that receivers and managers appointed by the Court must pledge their personal credit on the contracts reasonably necessary for carrying on the business.

Farwell, Q.C., in reply.

LORD ESHER, M.R. The action was for goods sold and delivered upon the order of the defendants, who were receivers and managers appointed by the Court to manage the business of a company. What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly. The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must primâ facie be taken to be orders given on his own responsibility and credit. How far he may be bound to give such orders it is not now necessary to determine. It may

(1) 1 Ch. D. 600. (2) 39 Ch. D. 538.

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be that, if his relation to the Court implies that he must within the bounds of reason carry on the business, as between him and the Court it would be his duty to give the necessary orders; but I apprehend that, if he finds himself thereby placed in a difficulty, and is unwilling to give orders, he may apply to the Court and the Court would protect him. One would hardly require any particular authority for a doctrine with regard to the position of a manager appointed by the Court that seems to be the inevitable inference from the nature of the case; but, if any were wanted, I think that the observations of Jessel, M.R., in *Sargant* v. *Reed* (1) shew that he thought that what I have stated in relation to the position of a receiver and manager appointed by the Court had been so often proved to be the fact that the Court would take judicial cognisance of it. I think also that the effect of what Chitty, J., stated in *Taylor* v. *Neate* (2), is the same. When he said in that case that, where the Court appoints a manager of a business, he must necessarily make what the learned judge calls "subordinate contracts," I think he meant contracts by which he pledged his own credit. I think, therefore, that that is the position which a manager appointed by the Court accepts when he undertakes the management of a going business. But, when the question is as to his liability as between himself and a third person, one must look at that person's position too. If it can be shewn that the third person accepted an order on the terms that the manager should not be personally liable; if, for instance, the manager went to a tradesman and stated that he was a manager appointed by the Court, and that he could not give him an order in the ordinary way, pledging his own credit, but only on the terms that he should be paid, if the assets of the business proved sufficient, of course the tradesman could not afterwards turn round and say that he supplied the goods on the manager's personal credit. Therefore there might be cases in which such a manager would not be personally liable; but, if there is no special stipulation of that kind, and, if the terms of the order merely amount to a statement that the giver of it, being a manager appointed by the Court, gives such an order, then I think the only business

(1) 1 Ch. D. 600. (2) 39 Ch. D. 538.

inference is that the tradesman is to look to the personal credit of the manager, and that the manager trusts to the funds in hand or the other assets of the concern for indemnity. The consequences of the opposite view appear to me to be so serious that no Court, having regard to the exigencies of business, would accept it, unless they were absolutely obliged to do so by authority; for the result would be that no tradesman could safely deal with such a manager without inquiring as to the existence of a fund to which he might look, whether, if such a fund existed, it was not subject to other liabilities, and whether the business was being carried on by the manager at a profit; and the same thing might apply to the servants employed in the business. We have therefore to consider the order here given, and what took place with regard to it, in order to see whether it imported that the plaintiffs were not to look to the defendants' personal credit. The order was signed, "For Joseph Bull, Sons & Co., Limited. Receivers and Managers, Edward C. Bull and Robert Jas. Ward." The order cannot be taken to mean that it was given for the company as principals; that was not true, because the defendants were not the agents of the company, and, if that was the meaning, they would be liable on an implied warranty of authority for damages equivalent to the price of the goods. If the word "manager" had been used alone, it might in business parlance be taken to indicate an agent; but the words are "receivers and managers," which do not, as it seems to me, import managers appointed by the company. That is legal phraseology, and would I think suggest to the other party that the defendants were receivers and managers appointed by the Court. So the terms of the order amount only to a statement that the defendants are receivers and managers appointed by the Court, and that being such they give the plaintiffs the order. It seems to me that the parties receiving such an order must know that they could not go to the Court for payment, and therefore they would supply the goods on the personal credit of those giving the order. The question whether credit was given to the defendants personally is really one of fact, depending on the circumstances of each case, because there might be circumstances which would take the case out of the general rule which

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I have laid down. The judge in this case has found that the case falls within the ordinary rule, and that the defendants intended to pledge and the plaintiffs to trust to the defendants' personal credit. I cannot say that his finding was wrong—indeed, I agree with it. For these reasons the appeal must be dismissed.

LOPES, L.J. The judge found that the defendants, who were receivers and managers appointed by the Court, had made themselves personally liable. In my opinion, the question involved in this and similar cases must be one of fact—viz., on what credit the goods were supplied in the particular case. The goods must be presumed, I think, in the absence of a clear agreement to the contrary, to have been supplied on the credit of some one. On whose credit could they have been supplied in this case, if not the defendants'? It was argued that the defendants had only given the order as agents. But the company after their appointment had no control over the business: it could give no orders and make no contracts. The defendants could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court. They gave the order as receivers and managers appointed by the Court to the plaintiffs, who knew the position of the company and that of the defendants. Under these circumstances, in my opinion, the goods must be taken to have been supplied on the credit of the defendants. It was urged that it was very hard to make receivers and managers personally liable. The answer to that argument appears to be that they have ample opportunity of protecting themselves, if they take the proper course. If they find that they have no funds to meet orders, I presume they need not give them; or, if they give orders, they may give them in such a form and on such terms as to exclude personal liability on their part. I cannot help thinking that what the defendants thought was that there were assets which would come to their hands, and to which they might look for indemnity, and that they intended, on giving the order, to incur personal liability. I think the conclusion of the learned judge was the right one. It is enough to say that it was not wrong; but I go further than

that, for I think that under the circumstances I should have arrived at the same conclusion myself.

RIGBY, L.J. It appears to me that the words "receivers and managers" appended to the defendants' signatures in the order were sufficient to put the plaintiffs on inquiry as to what that expression actually imported. If it really imported that they were merely servants or agents of a firm or some other persons, it might be unfortunate for parties who acted on the order without such inquiry. A case of *Owen & Co.* v. *Cronk* (1) recently came before the Court in which the facts were somewhat similar to those of the present case; but it appeared there that the persons described as receivers and managers were known to be agents of known principals, and we held that the defendants, who had professed to act as agents only, were not liable as principals where other principals were in existence. In this case the plaintiffs either knew already, or would have ascertained on inquiry, that the defendants were not agents in the proper sense for any individual person or company, but had been appointed in an action brought by debenture-holders in the Chancery Division to do what was supposed to be for the benefit of all concerned—viz., carry on an existing business. To induce them to accept that office a fund was provided, to which they might look for indemnity. Relying on that fund, as it seems to me, and apparently induced, in the case of one of them by the expectation of professional profit, and in the case of the other by the interest which he had in the matter, they undertook the position of managers. I do not propose to express in detail my views as to the position of receivers and managers appointed by the Court to carry on a business; but, according to my understanding of the matter, it cannot be intended by the Court in such cases to put forward an officer of the Court to carry on business—which might involve the making of contracts almost daily in the ordinary course of business—in such a manner as would be likely to delude members of the public into the idea that somebody would be responsible on those contracts, whereas nobody would be so responsible. I do not say that there might not be very

(1) Ante, p. 265.

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special cases in which the intention might be that receivers and managers should not pledge their personal credit, though I am not aware that any such have arisen; but with regard to receivers and managers appointed in the ordinary course of the business of the Court, unless I am much mistaken as to the meaning of such an appointment, the intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available; and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament. I do not say that it would be the duty of a receiver and manager to incur liabilities of an exceptionally heavy nature, but I think he must be understood to take on himself the ordinary liabilities that would fall on a person carrying on such a business as that to which his appointment relates. I do not say that, if the fund to which he was looking for indemnity failed, he might not come to the Court and ask to be relieved from responsibility; but I do not think he can get rid of responsibility on a contract merely by stating in the contract that he is a receiver. As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally, and he must look for indemnity from the liability so incurred to the assets. With regard to the cases cited, I am not surprised to find that there is not much authority on the subject. I cannot remember any cases more pertinent to the matter than those which have been cited. The reason is, I think, that the matter has always been supposed to be one in which the law is well settled. I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is, not that he is to be in the position of an agent, although there is no principal, but that he is to be in

a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into—e.g., executors or trustees, who, by the terms of the instrument appointing them, are directed to carry on a business for the benefit of others. The rule has always been that such persons are primâ facie themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees. The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment. The cases cited to us appear to me to involve, even if they do not lay down, the principle which I have endeavoured to express. I am sure that neither Jessel, M.R., in *Sargant* v. *Reed* (1), nor Chitty, J., in *Taylor* v. *Neate* (2), supposed that they were dealing with a new question; they treat the matter as one familiar to the Court, and merely refer to that part of the duties of a manager appointed by the Court to which it was necessary to refer for the purposes of the particular cases before them. They both refer to the fact that such a manager must as a matter of course enter into contracts, and they neither of them appear to entertain any doubt that he would be liable upon them personally. For these reasons, I agree that the judgment should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Trinder & Capron.*
Solicitor for defendant Bull: *W. J. Hastings Bull.*
Solicitor for defendant Ward: *Ward, Perks, & McKay.*

(1) 1 Ch. D. 600. (2) 39 Ch. D. 538.

E. L.

C. A.
1894
Oct. 27, 29, 30;
Dec. 18.

[IN THE COURT OF APPEAL.]

REDDAWAY AND OTHERS *v.* BANHAM AND OTHERS.

Trade Name—Common Law Right—Name indicating Manufacturer—True Description of Article Sold—Imitation—Tendency to Deceive.

A manufacturer is entitled to call his goods by a name which is merely a substantially correct description of them, although, by reason of another manufacturer's having for many years sold similar goods under the same name, purchasers may be thereby misled into the belief that they are buying the goods of that other manufacturer.

APPLICATION by defendants for new trial or judgment in an action tried before Collins, J., with a jury.

The action was brought by the plaintiffs for an injunction to restrain the defendants from using the term "camel hair" as applied to belting, in such a manner as to deceive purchasers into the belief that they were purchasing the plaintiffs' manufacture, and from passing off their belting as and for goods of the plaintiffs' manufacture.

The facts, so far as material to this report, were as follows. The case set up on behalf of the plaintiffs was that they had for many years been the sole manufacturers of a hair belting for machinery, which they advertised and sold under the name of "camel-hair belting," and that their belting had become so well known under that designation that the term "camel-hair belting" was understood in the market to mean their belting. Evidence was given for the plaintiffs chiefly in relation to India, which was their principal market, that persons buying belting as "camel-hair belting" would understand by that term belting of the plaintiffs' manufacture. The defendants had commenced to manufacture belting of the same kind, which they also advertised and sold under the name of "camel-hair belting." The defendants' case was that, their belting being made substantially of camel's hair, in describing it as camel-hair belting they were simply stating that which was true, which they were entitled to do. The evidence shewed that the material of which the kind of belting in question was made was known in the market as camel-hair yarn, and was at

any rate to a large extent composed of camel's hair. The plaintiffs' counsel, as will be seen, admitted during the argument in the Court of Appeal that the material of which the belting was made was substantially camel's hair.

The learned judge left the following questions to the jury: (1.) Does "camel-hair belting" mean belting made by the plaintiffs as distinct from belting made by other manufacturers? Or (2.) does it mean belting of a particular kind without reference to any particular maker? (3.) Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? (4.) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiffs, so as to be likely to deceive purchasers? The jury answered questions 1, 3, and 4 in the affirmative, and question 2 in the negative. The judge thereupon granted an injunction restraining the defendants from using the term "camel hair" as applied to belting, and thereby passing off their belting as and for the plaintiffs' belting.

1894. Oct. 27, 29, 30. *Bigham, Q.C.*, and *McCall, Q.C.* (*E. Sutton*, with them), for the defendants. This is not a case where a fancy name, by which the plaintiffs' goods have become known, is used so as to mislead purchasers. The goods are substantially made of camel's hair, and they are rightly described as such. A man is entitled to describe his wares by a correct and appropriate description according to the ordinary use of language, and cannot be restrained from doing so, even although the consequence may be that they are mistaken for the goods of another. The result of the cases is that, where the designation, by which the defendant's goods are advertised or sold, merely states that which is substantially true as to the nature of the goods or the way in which they are made, the plaintiff cannot claim an exclusive right to that designation: *Linoleum Manufacturing Co.* v. *Nairn* (1); *Burgess* v. *Burgess* (2); *Turton* v. *Turton* (3); *Edge* v. *Johnson* (4); *Young* v. *Macrae.* (5)

(1) 7 Ch. D. 834.
(2) 3 D. M. & G. 896.
(3) 42 Ch. D. 128.
(4) 9 Rep. Pat. Cas. 134.
(5) 9 Jur. N. S. 322.

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The learned judge ought on the evidence to have non-suited the plaintiffs, and not to have left to the jury the questions which he did. There was no evidence to go to the jury on the fourth question. There was no evidence of anything amounting to fraud by the defendants. The mere fact that the defendants made the same kind of belting as the plaintiffs, and sold it under the same description, which was a true one, does not entitle the plaintiffs to an injunction. [They also cited *Reddaway* v. *Bentham Hemp Spinning Co.* (1)]

Gully, Q.C., and *J. C. Graham*, for the plaintiffs. It is admitted on behalf of the plaintiffs that the belting in question is substantially composed of camel's hair, and therefore, if "camel-hair belting" had in the market the ordinary meaning of the words, the description of the defendants' goods would be substantially true; but the jury have found on sufficient evidence that in this case the words "camel-hair belting" had acquired in the market a special and artificial meaning, and that they indicated goods of the plaintiffs' manufacture. They had ceased therefore to be words of description, and had become a distinctive name in respect of which the plaintiffs were entitled to be protected. The principle deducible from the cases is that a manufacturer is entitled to prevent a rival in business from misleading purchasers into the erroneous belief that they are purchasing goods of his manufacture. A man is not entitled to use even a true description dishonestly so as to deceive or mislead the public: see per Lord Selborne, L.C., *In re Leonard & Ellis's Trade Mark* (2); *Waterman* v. *Ayres* (3); *Montgomery* v. *Thompson* (4); *Wotherspoon* v. *Currie* (5); *James* v. *James* (6); *Croft* v. *Day*. (7) If the words are ambiguous, because they mean one thing to ordinary persons and another to the trade, they cannot be said to be a true description within the proposition relied upon by the defendants. There was evidence for the jury on the fourth question, that the defendants had endeavoured to pass off their goods as those of the plaintiffs.

(1) [1892] 2 Q. B. 639.
(2) 26 Ch. D. 288, at p. 296.
(3) 39 Ch. D. 29.
(4) [1891] A. C. 217.
(5) Law Rep. 5 H. L. 508.
(6) Law Rep. 13 Eq. 421.
(7) 7 Beav. 84.

Assuming that they do no more than sell precisely the same kind of belting as the plaintiffs, under a description which is, according to the ordinary use of language, true, the authorities shew that, if they do this with the intention of passing off their goods as of the plaintiffs' manufacture, they are infringing the plaintiffs' rights and are liable to an injunction. [They also cited *Hendriks* v. *Montagu* (1); *Massam* v. *Thorley's Cattle Food Co.* (2)]

Bigham, Q.C., in reply. The law cannot go into any question of intention, provided the defendants do nothing but what they are entitled to do. A man has a right to carry on business in his own name, and to describe his goods as what they in fact are; and the motive with which he does so cannot be regarded. If the defendants have not by word or deed stated anything false for the purpose of representing that the goods which they sell are those of the plaintiffs, the plaintiffs cannot claim an injunction. If the defendants may not call their goods by their proper description, what are they to call them? It cannot be actionable to use an ordinary English expression truly describing the articles sold. The cases relied on for the plaintiffs, such as *Montgomery* v. *Thompson* (3) and *Wotherspoon* v. *Currie* (4), when analyzed appear to be cases where the name was really a fancy name, not a true description, or where there was some statement which was not substantially true. [He also cited *Raggett* v. *Findlater*. (5)]

Cur. adv. vult.

1894. Dec. 18. LORD ESHER, M.R. In this case the action was brought for an injunction to restrain the defendants from calling certain articles manufactured by them by the name of "camel-hair belting." The plaintiffs' case was that they had for many years made and sold, principally in India, camel-hair belting, which was belting of a very high quality, and that they had obtained in the Indian market a reputation for such goods under the name of "camel-hair belting," so that, if any one

(1) 17 Ch. D. 638.
(2) 14 Ch. D. 748.
(3) [1891] A. C. 217.
(4) Law Rep. 5 H. L. 508.
(5) Law Rep. 17 Eq. 29.

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wanted to buy their belting, he would ask for it by that name, and, if any one offered "camel-hair belting" for sale, it would be taken that it was their belting that was being so offered. They contended that, being in that position, no one else had a right to come into the market and sell goods by that name, and so interfere with and take away their trade, which they alleged the defendants to have done. The law on this subject appears to me to be well settled. A man may obtain, under circumstances such as existed with regard to the plaintiffs, although he has no patent and no question of a trade-mark arises, a right that no one shall come into the market and take away his business by what is really making use of his name. That, no doubt, has been decided as a general proposition; but it is subject, I think, to the exception that a man cannot be restrained by injunction from telling in the course of business that which is the simple truth. To that effect is the decision in *Turton* v. *Turton*. (1) In that case the circumstances were such that the plaintiffs had acquired a right within the meaning of the general proposition of law on the subject which I have mentioned; but the defendants' name was the same as that of the plaintiffs, and all that was proved against the defendants was that they had carried on business in their own name. It was true that by so doing they might and perhaps did take away business from the plaintiffs, after the plaintiffs had obtained the right of which I have spoken. But this Court, following the previous decision in *Burgess* v. *Burgess* (2), and I think explaining its true effect, held that there must be an exception from the general rule on the subject, where the defendant has done nothing more than use his own true name. If the defendants had called themselves Turton, when their true name was something else, they would have brought themselves within the general proposition of law on the subject to which I have alluded; but, if they only told the truth, i.e., called themselves Turton, which was their true name, and the public were thereby misled, they were not responsible for it, and could not be restrained from using their own name. The principle of that case appears to me to be clear, the major premise on which the judgment depends being that,

(1) 42 Ch. D. 128. (2) 3 D. M. & G. 896.

according to the law of England, a man cannot be restrained by injunction in such a case from telling what is neither more nor less than the exact truth. We were referred to a subsequent case decided in the Court of Appeal, viz., *Reddaway* v. *Bentham Hemp Spinning Co.* (1), in which an action for an injunction was brought by the present plaintiffs. In that case the Court could not have intended to decide anything contrary to what was decided in *Burgess* v. *Burgess* (2) and *Turton* v. *Turton.* (3) They were bound by those cases until they were overruled in the House of Lords. In that case similar belting was the subject-matter of complaint; but there the evidence was that at that time the belting was not being made exclusively or even principally of camel's hair—indeed, that there was very little camel's hair in it—and consequently the description used was not an accurate and true description. Therefore, it really became a fancy name. It was taken, as it seems to me, to be no more a true description of what was made than if it had been called "primrose" belting or any other fancy name. If the name used were a fancy name, not truly describing the material or thing sold, but merely designating it by a name, the case would not be within the exception I have mentioned, which arises only when a true name or description is used. So that case comes within the principle, that, if a man in any particular market has acquired the right to the use of a fancy name for his goods, although he has no patent and no question of a trade-mark arises, another person cannot make use of that fancy name. In the case now before us, the plaintiffs' counsel admitted during the argument that the material in question was made of camel's hair to such a substantial extent that camel-hair belting was a substantially correct description of it. I do not think that could have been clearly admitted at the trial, because it seems to me that the learned judge was under the impression that the material was of a nature similar to that in the former case of *Reddaway* v. *Bentham Hemp Spinning Co.* (1) But I think I can see why this admission was made before us, even if it was not made at the trial. It appears to me that the plaintiffs desire to have it decided that no one else

(1) [1892] 2 Q. B. 639. (2) 3 D. M. & G. 896.
(3) 42 Ch. D. 128.

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is entitled to call their manufacture "camel-hair belting," even though that is a true and accurate description of it. We must treat this case now as if the admission made by the plaintiffs' counsel had been made at the trial. Assuming the description given of the goods to be a true and accurate one, it follows from what I have said that the case falls within the exception from the general rule which I have mentioned, and the plaintiffs' claim fails. It is necessary therefore, in order to determine this case and other cases of the same kind, to indicate what is a true and accurate description for this purpose. I think that the rule may be laid down in this way. A man may call the goods he is selling by the name by which any one wanting to buy or sell the goods would in ordinary course call them in any market in which he wanted to buy or sell them, although in so doing he calls them by the name by which the person who complains has called his goods in a market, until in that market the name alone is taken to mean his goods alone.

Suppose, just by way of illustration, that a man invented shovels made wholly of iron: that he took out no patent for them and had no trade-mark, but sold those shovels under the name of iron shovels for so long a time and of such excellent quality, that at length he acquired a name for "iron shovels," and any one asking for "iron shovels" in that market would be taken to mean his iron shovels; and then another manufacturer came into that market and made iron shovels and offered them for sale as "iron shovels." If any one wanted to buy or sell iron shovels in any market, what else could he ask for or describe them as but "iron shovels"? It is what any one dealing in any market would have to call them. Again, suppose a man had gained a name for the manufacture of lozenges made of soda or liquorice, which he sold as "soda" or "liquorice lozenges." Applying the definition which I have given, what else could a person wanting to buy or sell lozenges made of soda or liquorice in any market call them but soda or liquorice lozenges? In such a case a man could not be restrained by injunction from selling his iron shovels or soda lozenges as "iron shovels" or "soda lozenges"; and, if his own name happened to be the same as that of the prior manufacturer, he could not be restrained

from selling them as his own iron shovels or soda lozenges, although persons dealing in the market might thereby be misled and imagine they were buying the other manufacturer's goods. The other manufacturer must put up with that, because the law cannot undertake to prevent a man from calling himself by his real name, and saying what is true about his goods. The use of a fancy name is an altogether different matter, because there it is not a question of a description of the thing sold, but merely of a name; and again, where a man calls himself by a name which is not his name, he is telling a falsehood, and the exception I have mentioned does not apply. The law being as I have stated, it has to be applied to this case. The only evidence is that the defendants have said and are going, if not restrained, to say in future that they make and sell camel-hair belting; and upon the admission of the plaintiffs' counsel that is a substantially true description of what they make and sell. Nobody could go into any market and buy or sell it by any other description. It seems to me that, if that be true, the questions asked of the jury by the learned judge were based on an incorrect view of the facts, with which he was imbued perhaps by reason of some indistinctness in the way in which the plaintiffs' case was put. They might have been the right questions to put if the question had been as to the use of a fancy name. But in my view of this case none of those questions ought to have been left to the jury. On the first three questions I think that the judge ought to have ruled for the defendants. With regard to the fourth question which the plaintiffs' counsel requested the judge to leave to the jury, it is to be observed that he does not appear to have requested the judge to leave to the jury the question whether the defendants had done anything fraudulent; and, indeed, no such question seems to have been raised by the pleadings. He asked the judge to leave to the jury the question whether the defendants had endeavoured to pass their goods off as those of the plaintiffs. I doubt whether the plaintiffs could have made anything of that question unless they had carried the matter so far as to say that the defendants had fraudulently done so. But in any case, was there any evidence on that question? The only facts which seem to have been before the jury on that question

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were that the defendants made their goods either exactly or as nearly as they could in the same way as the plaintiffs, and called them camel-hair belting. With regard to the imitation of the plaintiffs' wares, the plaintiffs had no patent, and the defendants had a right to imitate their wares. If they were trying thereby to beat the plaintiffs out of the market, they had a right to do that, if they could. They did nothing legally wrong. They called their goods camel-hair belting, but they only told the truth in so doing. It is said that, although what they did was not by itself wrong, it was wrongful, because they had a wrong intention in their minds, viz., to get their goods passed off as the plaintiffs'. But the law cannot take cognizance of the intention in a defendant's mind so long as he does nothing wrong in order to carry out that intention. Here, whatever the defendants' intention may have been, they did nothing but what they were entitled to do. Therefore, it appears to me that there was no evidence to go to the jury on the fourth question. For these reasons I think that the judgment ought to be for the defendants, and this application must be allowed.

LOPES, L.J. I do not propose elaborately to cite cases, but shall shortly state the law deducible from the authorities, which is in my judgment applicable to the subject under discussion.

A man may *correctly* in plain language describe the material of which his goods are made, though the description be the same as that of a rival manufacturer, and though the one, owing to the similarity of description, be likely by customers to be mistaken for the other, and though he may have closely imitated the description of the other; but he must not, in addition to correctly describing them, dress up or garnish his goods so as to make them resemble the goods of his rival, and he must not by words or conduct pass them off as the goods of his rival or endeavour so to do.

Should he so dress or garnish them, or so pass them off, an injunction will be granted restraining him.

The leading case on this subject is *Burgess* v. *Burgess*. (1)

(1) 3 D. M. & G. 896.

Knight Bruce, L.J., there said: "If any circumstance of fraud had accompanied, and were continuing to accompany, the case, it would stand very differently; but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which during many years has been possessed by the elder Mr. Burgess' essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy and selling it under his own name." Turner, L.J., concurred. He said: "no man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. When a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." The effect of that case is that, where a man is telling the truth with regard to his name or the description of his goods, there must be something in addition in the nature of fraud or misrepresentation to justify the interference of the Court.

The principle is as applicable to a truthful description of goods as to a truthful description of name.

Turton v. *Turton* (1) proceeds on the same grounds and supports the principle of law which I have enunciated. There are many other cases, but I think it unnecessary to pursue them, for, so far as I know, the principle embodied in *Burgess* v. *Burgess* (2) and *Turton* v. *Turton* (1) has never been impeached.

Applying that principle to this case, two questions arise: (1.) Have the defendants correctly in plain language described the material of which their goods are made: have they correctly described their goods? And (2.) have they acted fraudulently, or misrepresented their goods as the goods of the plaintiffs?

(1) 42 Ch. D. 128. (2) 3 D. M. & G. 896.

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It was admitted by Mr. Gully that substantially they had correctly described their goods. The belting was not exclusively composed of camel's hair; it could not be; there must be some foundation; but the main part was camel's hair, and in popular language the correct description of it was camel-hair belting. No doubt that was the name by which the plaintiffs called their belting; but they had acquired no monopoly of that name, and the defendants were entitled to apply it to their goods according to the authorities I have cited, if it correctly described them. To entitle the plaintiffs, therefore, to relief they must make out either that the defendants, in addition to correctly describing their goods, had dressed them up or garnished them so as to make them resemble the plaintiffs' goods, or by words or conduct passed them off as the plaintiffs' goods or endeavoured so to do. It is to such a state of things that, as I understand, the fourth question put to the jury by Collins, J., applied.

I can find no evidence of this. All I find is, that they called their belting by the same name as the plaintiffs', and probably as far as they could imitated it; but this they were entitled to do.

The case of *Montgomery* v. *Thompson* (1) was relied on; but it does not affect this case, because it proceeded on fraud.

This case is distinguishable from *Reddaway* v. *Bentham Hemp Spinning Co.* (2) In that case it was assumed that "camel-hair belting" was not a correct description of the article, but was rather a fancy name; at p. 646 of the report I find that I said that the evidence was that the plaintiff's belting contained little (if any) camel's hair, and was chiefly composed of hair of goats and sheep, the name of "camel-hair belting" being given to it as a distinctive name; on p. 647, I said that the defendants might have called their belting "goat-hair belting," "sheep-hair belting," "buffalo-hair belting," or many other names that might be suggested. This makes it clear that in that case it was never suggested that camel-hair belting was a true description of the article.

The plaintiffs in my opinion made out no case, and ought to have been non-suited.

(1) [1891] A. C. 217. (2) [1892] 2 Q. B. 639.

RIGBY, L.J. I am of the same opinion for substantially the same reasons; but, having arrived at clear conclusions on the points that have been argued, I think I ought briefly to express them. In the first place, although I quite agree with what the Master of the Rolls has said with regard to the admission made by the plaintiffs' counsel to the effect that the term "camel-hair belting" is a fair description of the goods, I do not think it is really necessary to rely on that admission, though, of course, we have a perfect right to do so; for I gather from the summing-up of the learned judge that what was admitted was in truth only the fair result of the evidence in the case, and that the plaintiffs' counsel was really driven to make the admission which he did by what was proved in the Court below. The evidence therefore seems to have been sufficient, independently of that admission, to bring the case within what I conceive to be the true view of the effect of the authorities on the subject of the "common law" of trade-marks, as it has been called by way of distinction from the statutory provisions of the Trade Marks Acts. I think that the true view of the law on this subject is that, where there is a description which, though it may not be absolutely accurate or exhaustive, is still, according to the popular use of language and for practical purposes, an accurate description of the article in connection with which it is used by the defendant, the plaintiff cannot claim a right to the exclusive use of that description. I may refer on this subject to the case of *Young* v. *Macrae* (1), not because the facts in that case are on all-fours with those of the present case, but on account of the principle there laid down. In that case the name of which the plaintiff claimed a monopoly was "paraffin oil." The oil in question was not pure paraffin; it contained other ingredients, some of which appear to have been quite as important chemically as the paraffin; but nevertheless the name "paraffin oil" was treated as substantially a description of the thing. The plaintiff, in that case, had a patent for a particular process for obtaining the oil, so that no one could have made the oil by that process without infringing his patent; but that process was for obtaining the oil from bituminous coal. Another substance was

(1) 9 Jur. N. S. 322.

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discovered subsequently in America, from which the oil could be obtained, viz., petroleum, and so it was possible without infringing the plaintiff's patent to make an oil which, for all practical purposes, was the same as the plaintiff's oil. The defendant sold that oil under the name of paraffin oil; and the question was whether the plaintiff had a right to prevent him from using that name. It was held that he had not, notwithstanding the existence of the patent. Wood, V.C., in giving judgment, took notice of the fact that the plaintiff had a patent for one process, which was originally the only process known, for obtaining paraffin oil, but said that, when another process was found out by which practically the same article could honestly be obtained, the defendant was entitled to sell the article so obtained by the same name, that being a correct description of it. Following out the line of illustration that has been given by the Master of the Rolls, I may mention that, in that case, the Vice-Chancellor put, by way of illustration, a hypothetical case with regard to beet-root sugar. If sugar is made from beet-root, "beet-root sugar" is a correct description of it, and none the less so because such sugar has been for a long period manufactured by one person under a patent for the only process then known for manufacturing sugar from beet-root, and called "beet-root sugar." As soon as another person has discovered another process for making the same commercial article, beet-root sugar, he cannot be prevented from calling such sugar by its proper name. I may also refer on this subject to the case of *Cheavin* v. *Walker* (1), which came before the Court of Appeal. It will be found on examination of that case that what the defendant had done was merely to describe certain filters sold by him as made in accordance with a certain patent of the plaintiff's which had expired. James, L.J., said, in giving the judgment of the Court of Appeal in favour of the defendant, "Whatever is mere description is open to all the world." That is the principle which, in my opinion, runs through all the cases on the subject. Therefore, as soon as it is shewn that the belting is substantially made of camel hair, it follows that the defendants are entitled to describe it as such. With regard to the case of *Reddaway* v.

(1) 5 Ch. D. 850.

Bentham Hemp Spinning Co. (1), it appears to me that Collins, J., in the Court below, a little misunderstood the judgment of Lindley, L.J., in that case. The Lord Justice did not, I think, mean to say that the proper questions to ask the jury in every case are the questions which the learned judge adopted in this case. He only meant to say, I think, that these were among the questions which ought to be asked. He did not exclude others. I agree with the Master of the Rolls that a case did not arise for the jury; but, in my opinion, if there had been a case for them, one of the questions which ought to have been left to them was whether, upon the evidence, the term "camel-hair belting" was a description or a fancy name. At any rate, the learned judge ought to have given to the jury such a direction as would make them understand the law on this point. Of such direction I find no trace in his summing-up.

With regard to the fourth question which the learned judge left to the jury, I have carefully considered that question and the form of the injunction. The injunction is to "restrain the defendants from using the term 'camel hair' as applied to belting and *thereby*"—the word "thereby" is clearly put in advisedly and is most material—"passing off their belting as and for the belting of the plaintiffs." I think that the only matter which the judge really meant to leave to the jury in connection with the fourth question was the use by the defendants of the term "camel-hair belting." His summing-up does not appear to refer anywhere to the make-up of the defendants' goods, but only to the description of them. Having regard to the course taken at the trial, I have no difficulty in coming to the conclusion that the plaintiffs' counsel purposely put the case for the plaintiffs upon the use by the defendants of the term "camel-hair belting." They seem to me to have wished to get a clear decision on the question whether the plaintiffs were entitled to the exclusive use of that term for their goods. The real object being to establish their title to that, other matters were treated as immaterial. The only question raised by the facts, apart from that as to the use of the term "camel-hair

(1) [1892] 2 Q. B. 639.

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belting," seems to resolve itself into this, viz., whether a man acts fraudulently who imitates the goods of a competitor in the market. Now, with regard to that question, I do not differ from what has been said by the other members of the Court as to the legal right of any trader to sell the same thing in the market as is sold by his competitor. This question was a good deal discussed in the case of *Singer Manufacturing Company* v. *Loog*. (1) In that case Lush, L.J., said, in delivering judgment for the defendant in the Court of Appeal: "The plaintiffs have no monopoly in the manufacture of sewing machines; the patents which they had expired some years ago, and it is now open to all the world to make the identical machines which they make, and to imitate theirs in every particular." In that case the article imitated was a sewing-machine; and an exterior part of the machine which would catch the eye at once, and which had nothing to do with the working properties of the machine, appears to have been imitated. It was, however, assumed that of itself that fact would not entitle the plaintiffs to an injunction In giving judgment for the defendant in the same case in the House of Lords (2), Lord Selborne stated that the plaintiffs had admitted, and it is obvious from the whole tenor of his judgment that he believed that admission to embody what the law allowed without any admission, that the defendant was at liberty to sell machines exactly similar both in form and construction to their own; and he had previously mentioned that the machines sold by the defendant were "exactly similar in form, pattern, and construction" to some manufactured by the plaintiffs. Lord Bramwell in giving judgment said that he thought the defendant "would do well to give up shape, stand, and ornamentation, which to me look very much as though it was intended his machines should be taken for the plaintiffs'." So that even a gross and palpable imitation of that sort was not of itself held to be in point of law a sufficient reason for granting an injunction against the defendant in that case. It is a different question how far such an imitation is morally right, and I should be disposed to agree with Lord Bramwell, who obviously thought that to imitate the

(1) 18 Ch. D. 395. (2) 8 App. Cas. 15, at p. 27.

wares of a competitor as precisely as appears to have been done in that case was as near the line as anything could be. For these reasons I agree that the application must be allowed.

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Application to enter judgment for defendants allowed.

Solicitors for plaintiffs: *W. J. & E. H. Tremellen, for A. MacDonald Blair, Manchester.*

Solicitors for defendants: *Chester & Co., for Chew, Sons, & Helditch, Manchester.*

E. L.

THE ATTORNEY GENERAL ON THE RELATION OF THE LOCAL BOARD OF THE BROWNHILLS DISTRICT AND THE LOCAL BOARD OF THE BROWNHILLS DISTRICT *v.* THE CONDUIT COLLIERY COMPANY.

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Nov. 2, 3, 19.

Local Government—Urban Sanitary Authority—Highway—Subsidence caused by Mining Operations—Right of Support—Absence of appreciable Damage—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 27.

A railway company constructed a railway on the level across a highway in the district of which the relators were the urban sanitary authority. Subsequently the defendants worked coal mines in a proper and usual manner beneath the highway, with the result that a gradual and uniform subsidence to the extent of about ten feet vertically took place of the highway, railway, and surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway company placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway:—

Held, in an action against the defendants for damages for the obstruction to the highway, that the defendants were not liable:

Held, also, per Collins, J., that, assuming the highway to be repairable by the inhabitants at large, and therefore vested in the relators under s. 149 of the Public Health Act, 1875, the subsidence of the highway having been substantial, the relators, notwithstanding that they had suffered no appreciable damage by reason of such subsidence, were entitled to judgment with nominal damages for the injury to their proprietary right.

Smith v. *Thackerah* (Law Rep. 1 C. P. 564) considered.

MOTION on behalf of the relators for judgment upon the pleadings, admissions of fact, and report of a special referee.

The relators were the urban sanitary authority of the Brownhills district and the defendants were mine-owners.

The plaintiffs alleged that the defendants had wrongfully

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worked, and were wrongfully working, mines under or near to a highway within their district, called Lion Lane, at a point where it is crossed by a branch of the London and North Western Railway, so as to lower or otherwise injure the surface of the highway and thereby impede the passage of the public.

The action was brought to obtain an injunction to restrain the defendants from causing a nuisance upon and damage to the highway by letting down the surface, and also 1400*l.* damages, which was alleged to be the cost of making the road passable by constructing a subway underneath the railway.

The defendants pleaded that they had worked the mines, as they were entitled to, in a proper and usual manner. They admitted that they had lowered the surface of the highway and of the surrounding land, but only in so general and gradual a manner as to cause no injury to the highway, and in no way to impede the passage of the public; and they said that if the passage of the public on the highway had been impeded, it had been impeded by the wrongful act of the London and North Western Railway Company, which, as they alleged, had carried their railway across the road upon the level without having obtained statutory powers authorizing them to do so.

In or about the year 1890 the defendants gave the company due notice, as required by the Railway Clauses Consolidation Act, of their intention to work the mines under and near the railway, and the company, not having within thirty days expressed their willingness to make compensation, they proceeded to work their mines in a proper and usual manner.

The effect of the working was to cause a general and gradual subsidence of the whole of the surface land above and near to the mines, including the surface of the level crossing and the highway on each side. Such subsidence in no way injured the highway or caused any obstruction to the public using it. The subsidence, however, lowered the surface of the railway, and the company, notwithstanding that they had in 1890 obtained powers by a private Act of Parliament (53 & 54 Vict. c. cliv., s. 31, sub-s. 6) to carry the railway across the highway by constructing a subway, banked up their railway, and, instead of carrying the railway across the highway on the level, made an

embankment across the highway along which to carry their railway, which embankment was the sole cause of the obstruction to the user of the highway.

In the alternative, the defendants pleaded that the highway and crossing and the surrounding land were part of the common of the manor of Norton Canes, and by the Norton Canes Inclosure Award made in 1870 under an Inclosure Act the mines were reserved to the lords of the manor, whose assignees and lessees the defendants were, and the award provided that the lords of the manor were not to be liable for any damage or injury caused by the subsidence of the lands through working the mines.

The defendants also denied that the relators had been or would be obliged to incur the expense alleged, as they were entitled to compel the railway company to cross the highway on the level, or to construct the subway, or to abate the nuisance caused by the embankment by removing it.

The plaintiffs in their admissions of facts admitted that the defendants had worked their mines in a proper and usual manner; that the subsidence had been a gradual and general subsidence of the whole of the land in the neighbourhood, and that the lands on each side of the highway had subsided with it, and that the highway had always been on a level with the lands adjoining it; that the railway company had banked up their line where it crossed the highway to a height of ten feet above the level of the highway; and that if the railway company had not put up the embankment the surface of the highway at the crossing would have sunk with and continued to be on the same level as the adjacent part of the highway, and there would have been no obstruction to the traffic passing along it.

The defendants in their admissions of fact admitted that the highway was one of the highways set out by the award mentioned in the defence, but said that it was in fact an ancient highway in existence before the making of the award, and before the making of the railway, which took place in the year 1854; that the railway was originally made at the crossing upon the level shewn upon the deposited plans and books of reference referred to in s. 4 of 17 Vict. c. liii., under which statute the

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railway was made, but said that the making of the railway upon that level was in contravention of s. 46 of the Railway Clauses Consolidation Act, 1845, the company not having obtained statutory power to cross the highway at a level (or the consent of two or more justices in petty sessions, assuming that the highway was not then a public carriage-way); that the railway was upon the same level at the crossing as it was originally made, and as it was before the subsidence; that the highway was impassable at the crossing for ordinary vehicular traffic, and became so in the year 1889 by reason of the embankment made by the railway company; that these mining operations had lowered the surface of the highway at the crossing about ten feet; and that they had ungotten mines of coal under the crossing, the getting of which would still further lower the highway.

The plaintiffs having refused to admit that the highway was an ancient highway and public carriage-way before and at the time when the railway company obtained the Act of Parliament authorizing the construction of the railway, the question was referred to a special referee, who found that the highway was an ancient highway and public carriage-way before that time.

The plaintiffs obtained leave to move for judgment upon the pleadings, admissions of fact, and report of the special referee.

Jelf, Q.C., and *Disturnal*, for the plaintiffs. The effect of the defendants' mining operations being to interfere with the preservation of the highway for its lawful use, the plaintiffs are entitled to recover from them damages for the injuries done to the highway, and that in spite of any statutory reservation to the lord of the manor of the power to work the mines without incurring any liability for the damage caused by the subsidence of land through the working: *Benfieldshire Local Board* v. *Consett Iron Co.* (1)

[COLLINS, J. Is not the obstruction to the highway caused by the embankment of the railway company a nuisance which the plaintiffs are entitled to abate?]

(1) 3 Ex. D. 54.

The railway company are authorized by statute to maintain their railway upon a certain level from which they have no power to deviate, and they cannot be compelled to remove the embankment. The case with respect to the railway is on the same footing as if a natural fault in the ground had caused the highway to subside on either side of the railway, leaving the railway in its original position.

[COLLINS, J. How are the defendants liable for the obstruction caused by the act of a third person?]

Upon the authority of *Harrison* v. *Great Northern Ry. Co.* (1) and *Clark* v. *Chambers* (2), and the cases there cited.

Moulton, Q.C., and *McIntyre*, for the defendants.

[WRIGHT, J. We think that the only question is whether the plaintiffs are not entitled to nominal damages in respect of the injury caused by the subsidence to their proprietary right in the highway.]

The highway and surrounding land were part of the manor of Norton Canes, and by the Inclosure Award the power to work the mines beneath was reserved to the lords of the manor, whose assignees and lessees the defendants are, without incurring any liability for damage caused by subsidence. The case of the *Benfieldshire Local Board* v. *Consett Iron Co.* (3) has no application here, because no act of the defendants has interfered with the preservation of the highway for its lawful use. It is the act of the railway company in forming the embankment which has obstructed the highway, and but for that act the highway would be in every way available for the use of the public. Even if the defendants were wrongdoers, the railway company alone would be liable: *Evans* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (4) Further, in *Coverdale* v. *Charlton* (5) there was an injury to a proprietary right which could be enjoyed. Here there is no such injury, no act of the defendants having interfered with the complete user of the highway by the public, or of any proprietary right therein vested in the plaintiffs: see *Wandsworth Board of Works* v. *United Telephone Co.* (6)

(1) 3 H. & C. 231.
(2) 3 Q. B. D. 327.
(3) 3 Ex. D. 54.
(4) 36 Ch. D. 626.
(5) 4 Q. B. D. 104.
(6) 13 Q. B. D. 904.

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[WRIGHT, J., referred to s. 27 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77).]

No damage has been done to the highway by any act of the defendants. In any case, the section refers to substantial damage only and not to nominal damages.

Jelf, Q.C., in reply. The plaintiffs are in the same position with respect to the letting down of the surface of the highway as a private owner would be, and had a right to have the soil in its natural unincumbered state left undamaged by the withdrawal of support; and as soon as the soil was let down had a right of action against the person withdrawing the support. The injuria is sufficient to support the action without damnum: *Brown* v. *Robins* (1); *Hamer* v. *Knowles* (2). *Smith* v. *Thackerah* (3) is not a decision to the contrary.

Cur. adv. vult.

On November 19 the following judgments were read:—

WRIGHT, J. This is a motion for judgment on admissions and on the report of a referee. The relators are a local board in whose district is a road called Lion Lane, across which the London and North Western Railway Company about 1854 carried a railway on the level in the ordinary way, but, so far as at present appears, without any specific authority. At some subsequent time the defendants worked their coal in the usual and proper manner under and in the neighbourhood of Lion Lane, with the result that a gradual and uniform subsidence of a large area of ground occurred, and altered the level of the lane and of the railway together with the rest of the surrounding land. There is no admission or finding that any actual damage has been caused to the roadway itself by the subsidence, or that it has been thereby rendered less convenient in itself, or that the relators have been or will be thereby put to any expense. But what has happened is this. The railway company from time to time, as the country and their line gradually subsided, have placed ballast under their rails so as to maintain the original level of the line, with the ultimate result that in place

(1) 4 H. & N. 186. (2) 6 H. & N. 454.
(3) Law Rep. 1 C. P. 564.

of a level crossing there is now an embankment some ten feet high barring the use of the lane. The relators claim that the lane is vested in them as the urban sanitary authority, and they bring this action for the purpose of obtaining some relief against the defendants.

In the first place, they claim an injunction to restrain the defendants from causing further subsidence; but as to this part of the claim it is enough to say that there is no admission or finding that further subsidence is likely to occur without further working of the coal, or that any further working of the coal is threatened or intended by the defendants, and we cannot on the materials before us draw any such inference.

The only other claim is for 1400*l.* as the "cost of making road passable by construction of subway underneath the railway." As to this again, it may be enough to say that no such expenditure has been incurred or is to be incurred by the plaintiffs, nor probably have the plaintiffs any power to construct such a subway, unless by the consent of the railway company.

The real object of the action is to obtain as damages such a sum as will provide funds for the construction of a subway. The defendants are not under any such liability to the relators. It is not the defendants who have placed or who maintain the obstruction which is the real ground of complaint. The remedy, if any, is against the railway company. They have special statutory power to make a proper subway, and, assuming that the lane was dedicated to the public before the construction of the railway, it may be that, on the doctrine applied in *Geddis* v. *Proprietors of Bann Reservoir* (1) and *Oliver* v. *North Eastern Ry. Co.* (2), they can be compelled to abate the nuisance, or indeed that apart from that doctrine they are liable to indictment.

But although the action fails so far as regards its only substantial objects, it was suggested in argument that the relators are entitled to nominal damages and costs of action on the grounds that the soil of the highway is vested in them by the Public Health Act, and that any alteration of the level is an infringement of their proprietary right. I doubt whether, assuming the highway to be repairable by the inhabitants at

(1) 3 App. Cas. 430. (2) Law Rep. 9 Q. B. 409.

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large, and therefore vested in the relators, the decision in *Coverdale* v. *Charlton* (1) is applicable so as to give a right of action where there is no real damage; but I do not think it necessary to decide this important question, in relation to which *Smith* v. *Thackerah* (2) may have to be considered. The defendants claim to be entitled under the provisions of an inclosure award as against the surface owners to let down the surface by proper mining, and if they are so entitled, then it appears to me that the provisions of the 27th section of the Highway Act, 1878, control the operation of the Public Health Act, and, in my opinion, under that section no action could be maintained except for actual damage. It may even be arguable that the case of the *Dudley Canal Co.* v. *Grazebrook* (3), and not *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (4), applies, and that negligent and improper working must be shewn. But it seems to me that the case comes before us in a way which does not enable us to deal satisfactorily with these questions. The attention of the parties has never been directed even to the initial question, whether Lion Lane is a highway repairable by the inhabitants at large. It is doubtful whether it was a highway at all in 1835; but unless it was a public highway before that date it cannot have become a highway repairable by the inhabitants at large unless by virtue of proceedings as prescribed by the Highways Act, 1835, or by the Public Health Act, and no such proceedings are alleged. Nor are there any admissions or findings which enable us to say whether the defendants have not under the inclosure award and as against the surface owners a right to let down the surface. It seems to be admitted that they have unless the soil of the roadway is to be taken to be excepted; but it is at least arguable that they have the same rights in respect of the roadway as in respect of the adjoining lands, subject to the provisions of the Public Health Act as altered by the Highways and Locomotives (Amendment) Act, 1878.

The attention of the parties not having been directed to these points, and the admissions and findings not being sufficient to enable us to come to any satisfactory conclusions upon them,

(1) 4 Q. B. D. 104.
(2) Law Rep. 1 C. P. 564.
(3) 1 B. & Ad. 59.
(4) 14 App. Cas. 248.

and, the relators having clearly failed on the only real point which they came here to argue, I think that the motion for judgment must be dismissed, leaving it open to either party to bring the action on for trial if they think it worth while on the question of nominal damages.

COLLINS, J. In this case the plaintiffs, a local authority, in whom a highway (being, as I assume, for the defendants did not dispute it, a highway repairable by the inhabitants) is vested under the Public Health Act, seek to recover damages from the defendants who are mine-owners, for the withdrawal by them of vertical and lateral support which has had the effect of letting down the highway to the extent of about ten feet. The subsidence of the highway is part of a general subsidence of a large tract of country brought about by the defendants' workings, and no inconvenience would be caused to the public and no expense to the plaintiffs, but for the fact that a railway crossed the highway at its original level and, while the highway has been allowed to subside, the railway has been maintained at its old level. The consequence is that the railway now crosses the road on a solid wall or embankment ten feet high, forming an absolute bar to the passage of traffic. Before beginning the workings which caused the subsidence the mine-owners gave to the railway company notice pursuant to the Railway Clauses Act; but the latter declined to purchase, preferring to bear the expense of such works as should be necessary in order to maintain the line at its old level. This case comes before us upon admissions and upon the finding of a referee, and it is found as a fact that the road in question was an ancient highway and public carriage-way at the date when the railway was made, and, though this admission in no way binds the railway company, the rights of the parties to this action must be ascertained on the basis of such being the fact. There is no special provision whatever in the railway company's Act providing for the crossing of this road. There is merely a general power authorizing the undertakers to make and maintain the railway in the lines and at the levels shewn on the plans, and it is admitted that the rails are now at the level shewn on such plans. The plaintiffs contend that they can recover

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from the mine-owners the estimated cost of making a subway under the railway, as part of the damages flowing from the subsidence brought about by their acts. The mere statement of this proposition seems to carry with it its refutation. In what sense can the railway embankment be said to be caused by or legally consequent upon the subsidence? On the assumption that the road was a public highway the railway company had no right to cross it otherwise than as provided by s. 46 of the Railways Clauses Act, that is to say, over or under it if it was a carriage-way, or, with the consent of justices, on a level if it was not a carriage-way; but it took no power to obstruct the road by erecting a wall across it. It was argued that the railway company have a right to maintain their line at the original level, and so they have; but this could not justify them committing a nuisance by obstructing a highway, nor can the defendants be made responsible for the independent wrong of the railway company. Suppose, after the bill had passed and before the railway was built, the road had sunk, would the railway company have been justified in building a solid wall across it? If not, what difference can it make that the wall has been built by degrees and not all at once. I am clearly of opinion, therefore, that the defendants cannot be made responsible for the costs of removing the obstruction placed on the road by the railway company.

These considerations suffice to determine the real question in the action against the plaintiffs; but it was contended by Mr. Moulton that the plaintiffs, being only owners sub modo of the surface of the highway, cannot maintain an action even for nominal damages, as, but for the existence of the railway, the subsidence has caused them and will cause them no pecuniary loss, nor in any way interfere with their user of the road under their various powers. It seems to me, however, that to take this view would be to adopt the contention which was rejected in *Coverdale* v. *Charlton*. (1) In that case it was held that the local authority took such an interest in the soil of the road as to enable them to confer a right upon a grantee to maintain trespass. I think the limitations placed upon their interest in air above the surface in the subsequent case of *Wandsworth Board*

(1) 4 Q. B. D. 104.

of Works v. *United Telephone Co.* (1), and upon the duration of their interest in *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2), in no way modify the effect of the former decision as to their right in the soil of the street itself. Those cases seem to me clearly to establish that a property, as distinguished from an easement in that which constitutes the street, is vested in the authority, and, I think, it would be to put an anomalous limitation upon ownership to hold that the persons in whom such property is vested cannot maintain an action for an invasion of their proprietary rights on proof of a substantial subsidence such as, I think, is shewn in this case, even though unaccompanied by proved pecuniary damage. "I think," says Brett, L.J., in *Coverdale* v. *Charlton* (3), "that the local board . . . had to a certain depth of the land, and to the whole surface, the ordinary rights of proprietors." Mr. Moulton did not contend that an ordinary owner would not have this right, nor did he suggest that there were any special limitations in this case placed on the rights of the owner of the surface, unless they were to be found in the provisions of the Inclosure Act referred to in the admissions, as to which, however, he did not contest the authority of *Benfieldside Local Board* v. *Consett Iron Co.* (4); but, in consequence of an observation from the bench, the point was raised and discussed, and, as the plaintiffs' rights are certainly not higher than those of a private owner, it is necessary to decide it.

I have no doubt whatever that such an action would lie without proof of pecuniary loss. I think the principle at the root of the matter is, that the owner is entitled to have his land "remain in its natural state, unaffected by any act done in the neighbouring land": see per Willes, J., delivering the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse* (5), and that as soon as the condition of the plaintiffs' land has been in fact changed to a substantial extent by the withdrawal of lateral support, the plaintiff has sustained an injuria for which he may maintain an action without proof of pecuniary loss. In the same case, Willes, J., compares the right to that in the flow of a natural

(1) 13 Q. B. D. 904.
(2) 14 Ch. D. 785.
(3) 4 Q. B. D. 104, at p. 121.
(4) 3 Ex. D. 54.
(5) E. B. & E. 622, at p. 657.

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river—a right which is unquestionably invaded where a sensible alteration has been produced in the character of the water where it passes the plaintiff's land, although there is no money damage: see *Ormerod* v. *Todmorden Mill Co.* (1); *Crossley* v. *Lightowler.* (2) That such is the true principle—that is, that it is the subsidence and not the pecuniary loss which grounds the cause of action—is, I think, apparent from those decisions which establish that, on proof that the weight of a newly-erected house has not contributed to the subsidence, its value may be recovered by way of damage consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land: *Brown* v. *Robins* (3); *Hamer* v. *Knowles.* (4) In these cases the fall of the house itself could give no cause of action, for there was no right to have it supported; therefore an injuria giving a right of action had to be shewn before the consequential damage by reason of the falling house could be claimed; and such an injuria was shewn on proof that the unincumbered soil would have subsided, although no pecuniary damage, even to the extent of a farthing, was suggested or proved had not the house been there.

The judgments in the *Darley Main Colliery Co.* v. *Mitchell* (5), which, it was suggested, countenanced the contrary view, seem to me to be entirely opposed to it. In the Court of Appeal Lord Esher throughout treats the subsidence itself as the cause of action, and Lords Justices Bowen and Fry both express their preference for that view. In the House of Lords nothing to the contrary of this is said by any of the learned Lords, and it is formulated in most distinct terms by Lord Fitzgerald in four propositions, of which the first and fourth are as follows:—

1. The owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

4. When in consequence of (the owner of the minerals) not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action.

(1) 11 Q. B. D. 155.
(2) Law Rep. 2 Ch. 478.
(3) 4 H. & N. 186.
(4) 6 H. & N. 454.
(5) 14 Q. B. D. 125; 11 App. Cas. 127.

I do not think that the words of Lord Cranworth in *Bonomi* v. *Backhouse* (1) in any way conflict with this view. He says, at p. 512, "his" (that is, the plaintiff's) "right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain." I think he merely means that there must be some real, sensible interference with the land, and that he did not mean to suggest that the ordinary enjoyment of the land was not interfered with wherever the damage caused by such interference was not measurable in money. He is merely excluding as causes of action interferences so slight as to come under the rule *de minimis*. No doubt learned judges have not always used the words "damage" and "injury" in their strictest technical sense in dealing with such questions. It was frequently quite unnecessary to do so, as there was pecuniary damage as well as injury.

Another source of some confusion is that damage not measurable in money has been treated as equivalent to a physical alteration so small as to amount to nothing in contemplation of law—an observation which may perhaps explain *Smith* v. *Thackerah* (2), which is the only case, so far as I know, which might seem to throw doubt on the principle which I have stated. The report, too, of that case in the *Law Journal Reports* (3) give some ground for supposing that the weight of the buildings may have contributed to the subsidence: see the judgment of Byles, J., and the argument of the defendant's counsel.

On the whole, I am clearly of opinion that an ordinary owner could maintain an action for nominal damages on the facts in this case, and, as I have already said, I think the local authority stands in no worse position, subject to another point which was not indeed taken by counsel, but which was raised during the argument and must be decided, namely, the effect of s. 27 of the Highways and Locomotives (Amendment) Act, 1878, which permits the mine-owner to mine just as he might do if the road had not become vested in the authority, "but so nevertheless that in such working or getting no damage shall be done to the road or highway." Road or highway in this connection cannot

(1) 9 H. L. C. 503, at p. 512. (2) Law Rep. 1 C. P. 564.
(3) 35 L. J. (C.P.) 276.

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mean the right of passage only as distinguished from that which constitutes the street, and I do not think the word "damage" is used to denote only damage measurable in money, or that the section was intended to give the miner larger rights against a local authority than he would have had against any other owner of the surface only, so as to debar the former from suing without shewing pecuniary loss where the latter might sue for the injuria only.

The argument which might be urged against the view which I have taken, based on the absence of any provision for compensation to the mine-owner, is, to some extent, met by the observations of Brett, M.R., in *Coverdale* v. *Charlton* (1); and when it is remembered that the origin of highways is dedication, which is primâ facie a renunciation by the grantor of the right to derogate from his grant by interfering with the enjoyment of the highway, the alleged injustice could hardly, in most cases, amount to a real grievance. As against the adjoining mine-owner, in the absence of some contract between him and the dedicating owner, there is no alteration of rights, and, therefore, nothing to compensate. What would be the position of the local authority if, at the time of the dedication there were rights subsisting for third persons against the grantor, it is not necessary to determine, as there is no suggestion that any such rights existed in this case.

Lastly remains the claim for an injunction. Upon this part of the case I think the plaintiffs have not made out such a case of probable continuance by the defendants of workings likely to affect the highway as to warrant us in granting an injunction.

In the result, I think the plaintiffs are entitled to judgment with nominal damages against the defendants; but as they have failed in the real claim in the action, I think it should be without costs.

Solicitor for relators: *Fritch Needham, for Stanley & Jackson, Walsall.*

Solicitors for defendants: *Smiles & Co., for Duignan & Elliot, Walsall.*

(1) 4 Q. B. D. 104.

J. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 29, 30; *Dec.* 1.

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REID *v.* WILSON AND KING.

Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2—*House used for Public Entertainment or Amusement on Sunday—Penalties—"Keeper" of House—"Person Managing or Conducting Entertainment.*"

By the Sunday Observance Act, 1780, s. 1: "Any house, room, or other place which shall be opened or used for public entertainment or amusement upon any part of Sunday, and to which persons shall be admitted by the payment of money, shall be deemed a disorderly house or place, and the keeper of such house, &c., shall forfeit 200*l.* for every day that such house, &c., shall be so opened or used on Sunday, and the person managing or conducting such entertainment or amusement on Sunday shall likewise for every such offence forfeit 100*l.*" By s. 2, any person who shall appear, act, or behave himself as master, or as the person having the care, government, or management of such house, &c., shall be deemed to be the keeper thereof, and shall be liable to be sued or prosecuted, notwithstanding he be not in fact the real owner or keeper thereof.

A hall, which belonged to a company in liquidation, was let by the solicitor of the liquidator, as his agent, to a society formed for the purpose of giving lectures on Sunday evenings on art, science, literature, and other subjects. The public were admitted to these lectures on payment of small sums. The solicitor had obtained in his own name from the local authorities a licence for music and dancing in respect of the hall.

At the trial of an action against the solicitor, and a person who had acted as chairman at one of these lectures, and had introduced the lecturer to the audience, to recover penalties under the above Act, the jury found that on the occasion of the lecture the hall was used for public entertainment or amusement within the meaning of s. 1:—

Held, that neither defendant came within the description of the persons liable to penalties under the Act.

Decision of Mathew, J., affirmed.

ACTIONS brought to recover penalties under the Sunday Observance Act, 1780 (21 Geo. 3, c. 49).

The facts were thus stated by Mathew, J., who tried the actions:—

A number of leading citizens at Leeds had formed themselves into a society, called the Leeds Sunday Lecture Society, for giving on Sunday evenings lectures on art, science, literature, and sociology. The public were admitted on payment of small

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sums, but the lectures were not instituted for purposes of profit. A hall called the Coliseum was acquired by the society, and a number of lectures were given, in respect of two of which the present proceedings were instituted. There was no evidence that any of the lectures before those in question were within the prohibitory clauses of the Act; but it was said that on Sunday, the 7th, and Sunday, the 21st, of January, 1894, the lectures were of a forbidden character, and rendered the defendants liable to the penalties sought to be recovered. On January 7 Mr. Villiers gave a lecture on "Chicago, Past and Present," with a description of the recent exhibition called "The World's Fair." The lecture was illustrated by limelight representations of the places and persons described. The second lecture, on January 21, was delivered by Mr. Max O'Rell on the characteristics of the three nations—England, Ireland, and Scotland. The defendant Ward, who was mayor of Leeds and president of the society, took the chair at the first lecture; at the second the defendant King was chairman. On each occasion the chairman introduced the lecturer, and then left the platform and took his place among the audience. Mr. Wilson was a solicitor. He had no personal interest in the Coliseum, nor was he shewn to have any knowledge of the character of the lectures proposed to be given. The hall belonged to a limited company in liquidation. Wilson had been secretary to the company, and afterwards acted as solicitor to the liquidator. It would be necessary to obtain from the local authorities a licence for the use of the hall for music and dancing, and that licence had been granted to Wilson. It was admitted that the terms of the licence had not been departed from. A Mr. Watson, who was manager of the hall for the company owning it, had agreed with the society as to the terms on which the hall was let, and Mr. Wilson, on behalf of the liquidator, had sanctioned the arrangement. At the trial of the action the jury came to the conclusion that the hall upon the occasions in question was a place open and used for public entertainment or amusement, and, upon the evidence given as to the highly diverting means by which any information contained in the lectures was imparted, this conclusion seemed reasonable. After the verdict the objection was taken by the counsel for the

defendants that there was no evidence that the defendants had so acted as to bring themselves within the penalty clause, and the case was reserved for further consideration. It was argued, on the one hand, that, upon the facts, which were not in controversy, the liability of the defendants was established, and that judgment should be entered for the plaintiff, while, on the other hand, it was contended that the defendants had not come within the description of those rendered liable to penalties by the Act.

Sir R. E. Webster, Q.C., and *Cecil Chapman*, for the plaintiff.
Robson, Q.C., and *Corrie Grant*, for the defendants.

Cur. adv. vult.

MATHEW, J. (after stating the facts as above, and referring to sects. 1 and 2 of the Act) continued:—Some light is thrown upon the meaning of the Act by the prior Act, 25 Geo. 2, c. 36, which deals with classes of disorderly houses described in the statute. Sect. 2 applies to unlicensed places which are used or kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, and directs that each of such houses shall be deemed a disorderly house or place; and then comes s. 5, which applies to houses kept for immoral purposes (the places in question being of a very offensive description), gaming-houses, or other disorderly houses, and provides in terms which are well known for the prosecution of the keepers of such houses; and s. 8 is similar to s. 2 of the Act of 21 Geo. 3, and describes the persons who are to be regarded as keepers of the house. Now, in the category of these houses is placed under the Act 21 Geo. 3, c. 49, any place "used for public entertainment or amusement on Sunday, and to which the public are admitted upon payment." There is little difficulty in ascertaining from the statute of Geo. 2 who the "keeper" of such an establishment is, and who is the person "having the care, conduct, or management," and the analogy to the hall in question would seem to be extremely remote.

Now, that these statutes are of a highly penal character as

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regards persons who keep a disorderly house is shewn from the 3 Geo. 4, c. 114, which exposes the defendant to imprisonment and hard labour.

It appeared from the statement of claim in each of these actions that the defendant Wilson was proceeded against as "keeper" of a place used for public entertainment and amusement, and it was argued for the plaintiff that the facts that the licence had been granted to him and that he had sanctioned the letting of the hall to the society were conclusive upon this point. But Wilson was only the agent for the liquidator to procure a tenant or tenants for the hall. He derived no profit from the tenancy, nor had he any responsibility for the use to which the hall was put for purposes of public entertainment, so long as the provisions of the licence were observed. He was not, as it seems to me, within the description of "the keeper" contained in s. 2. He was not master or mistress of the hall, nor was he the person appearing to be the master or mistress, or the person having the care, government, and management of the hall. He was no more the "keeper" of the hall than the liquidator. The landlord of a house used by others for the purposes mentioned in the statute, or a house agent who was employed to find a tenant, could not, with any regard to accuracy, be called the "keeper" of the house, and I am of opinion that, as against Wilson, the actions fail.

Then, as to the defendants Ward and King, each of them was said to be liable, not as a joint keeper of the room under s. 2, but on the following grounds: (1.) As "chairman of the meeting"; (2.) as "master of the ceremonies"; and (3.) as "the person managing or conducting the entertainment or amusement." As to the first, it is clear from the section that the meeting referred to means a meeting for the purpose of profane debate on the Lord's day. The words are: "The person managing or conducting such entertainment or amusement on the Lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the Lord's day"—that is, any such meeting as is described in the earlier part of the section. Then as to the second ground, neither of the defendants could be said to be master of the ceremonies. That description is applicable to amusements of a

different character, and which are in no respect analogous to the lectures in question. Nor can it be said with reference to the third point that either of the defendants managed or conducted the entertainment or amusement. The chairman on each occasion managed, not the entertainment, but the meeting of those present at the lecture. He had no authority but that derived from the consent of the audience. It was not shewn that he had anything to do with the selection of the lecturer. He could not control the gentleman who gave the entertainment, and who might be amusing or dull as he thought proper. The chairman could not compel him to be either grave or gay, and any interference on his part with the lecturer, on the ground that he was too entertaining, would probably be resented by the meeting, and would lead to the selection of another chairman. I do not consider that these defendants are shewn to have been liable on any of the foregoing grounds, and I am therefore of opinion that the defendants, Ward and King, are not liable, and I give my judgment for all the defendants with costs.

The plaintiff appealed in both actions.

Sir R. E. Webster, Q.C., and *Cecil Chapman*, for the plaintiff. The construction which the learned judge has put upon the Act (21 Geo. 3, c. 49) (1) is erroneous. He has really ignored s. 2,

(1) Sect. 1 provides that "any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of 200*l.* for every day that such house, room, or place, shall be opened or used as aforesaid on the Lord's day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses, and the person managing or conducting such entertainment or amusement on the Lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the Lord's day, shall likewise for every such offence, forfeit the sum of 100*l.*, to such person as will sue for the same; and every doorkeeper, servant, or other person, who shall collect or receive money or tickets from persons assembling at such house, room, or place, on the Lord's day, or who shall deliver out tickets for admitting persons to such house, room, or place, on the

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and the result of his decision is practically to render the Act of no effect.

The defendant Wilson was the "keeper" of the hall within the meaning of s. 1, or he was the person who was under s. 2 to be "deemed to be the keeper." He was the person who "appeared to have the care, government, or management" of the hall. He was exercising authority or dominion over the hall. He gave to the society permission or licence to use the hall on Sundays, and he obtained in his own name the licence for music and dancing. The Act will easily be evaded if an agent, who does exactly what his principal would have done if he had acted for himself, is not to be responsible. The Act makes a "person" liable to the penalties; this does not include a corporation: *Pharmaceutical Society of Great Britain* v. *London and Provincial Supply Association.* (1)

The defendants Ward and King were respectively "the persons managing or conducting the entertainment," or "the president or chairman of the meeting," within the meaning of s. 1, and as such are liable to the penalty. They could have put a stop to the lecture, and were responsible for order at the meeting.

Robson, Q.C., Corrie Grant, and *J. A. Johnston,* for the defendants, were not called upon.

LORD ESHER, M.R. I feel no doubt about this case. The Act imposes penalties, and therefore must be construed and applied strictly, and the first question, therefore, is, was the defendant Wilson the "keeper" of this house? The jury have found facts from which it was contended that the house was to be deemed to be a "disorderly house," and we have to see whether, applying the Act strictly to the evidence, Wilson was

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Lord's day, shall also forfeit the sum of 50*l.* to such person as will sue for the same."

By s. 2: "Any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, room, or place as aforesaid, shall be deemed and taken to be the keeper thereof, and shall be liable to be sued or prosecuted, and punished as such, notwithstanding he or she be not in fact the real owner or keeper thereof."

(1) 5 Q. B. D. 310.

the "keeper" of this house which is to be deemed disorderly. He had been the secretary of a company which had the power of letting the house. If he had let the house when he was secretary and when the company were his masters, though he had actually made the bargain for the letting, he would not have been the person who let the house. It would have been the company who let the house, and the company could not have been sued for penalties under the Act. When the company came to an end and a liquidator was appointed it could not be said that he was secretary to the company. He was not secretary to the liquidator, for the liquidator had never appointed him as his secretary. He was apparently the solicitor who advised the liquidator, and he and the liquidator together thought that this building should be let. Then he, acting for the liquidator, actually let the house; and he seems to have signed his own name as if he had the power to let it. Take it that he let it, though in truth he did not. Is the person who lets a house the "keeper" of it when it is a "disorderly house"? Suppose that he let it for the very purpose of its being used contrary to the Act. He lets it, and then has nothing more to do with it; but he lets it upon such terms as that the tenant may or may not commit a breach of the Act. He who let it is only the landlord who has let the house to a tenant who can use it legally or illegally. If the tenant does an illegal thing he, not the landlord, is the keeper of the house for the purpose of the Act. In no sense can it, in my opinion, be said that Wilson was the "keeper" of the house. He applied for a licence for music and dancing; but he had nothing else to do with music and dancing. He obtained the licence in order that his lessee might have music and dancing in the house—that is, on week-days. The obtaining of the licence is in no way material to any question which we have to decide. Wilson was not the "keeper" of the house.

Then comes the question, is he to be deemed to be the keeper under s. 2 of the Act? For that purpose he must appear, act, or behave himself as master or "as the person having the care, government, or management" of the house. What did he do? He let the house, and there is nothing to shew that he ever did anything more. There is no case whatever against him.

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Lord Esher, M.R.

Then we come to the other defendants, Ward and King. Ward was taken as a specimen. A meeting was to be held, or a lecture to be given, and, when the lecture was advertised, he was advertised as chairman. He appointed himself "chairman of the meeting." The meeting consisted of the people who went to hear the lecture—the audience. Then Wilson was the chairman of the audience; but as such he had no power to arrange or to alter the entertainment, or to interfere with it in any way. He did not in any way manage or conduct the entertainment. He did not appear to do either, or to have the power to do either. At the most, he would call to order or manage any person who interrupted the entertainment. He did not manage or conduct the entertainment. In no sense can it be made out that he is liable to penalties under this Act. The plaintiff has sued the wrong persons. The appeals must be dismissed with costs.

LOPES, L.J. This is a penal statute, and it is a well-established rule that the person whom it is sought to make liable under such a statute must be strictly brought within its words. The defendants must, therefore, be strictly brought within the description of the persons mentioned in this Act as intended to be made liable to penalties.

I take first the case of the defendant Wilson. It is said that he is liable because he was the "keeper" of this house. In my opinion, all he did was to let the hall as agent of the liquidator. The company was in liquidation; the directors no longer existed; its affairs were in the hands of the liquidator, and Wilson acted simply as his agent. If Wilson can be made liable, it appears to me that any house agent who is employed to let a house will be equally liable if he lets it, and it is afterwards used for a Sunday entertainment of this kind. There is no evidence that Wilson knew the nature of the entertainment which was to take place. For all we know, instead of the society producing something amusing and entertaining, they might have produced something as dull as possible, and in such a case Wilson clearly could not have been liable. If he had no knowledge whatever of the nature of the proposed lecture, there is no pretence for making him liable.

Then it is said that the two other defendants, each of whom acted as chairman at a lecture, are liable as persons "managing or conducting the entertainment." In my opinion, the chairman had nothing whatever to do with the management or conduct of the entertainment. The entertainment was entirely in the hands of other persons. He could not control it in any way whatever. The only persons who, so far as I know, could have controlled the entertainment were the society, and the society could not be made liable under this statute. In my opinion, the defendants do not in any way come within either the meaning or the spirit of this Act. I think, therefore, that the appeals must be dismissed.

RIGBY, L.J. As to the defendant Wilson, the utmost that can be said is, that he did not positively prove a state of facts which would negative the suggestion that he had the "care, government, or management" of the house. That, of course, is not enough to make him liable. The plaintiff is bound to prove positively facts which lead to the conclusion that he "appeared, acted, or behaved himself as the person having the care, government, or management" of the house. I neglect the other words of the section, because they are manifestly not applicable here. As regards the other defendants, I think that upon the evidence it is clear that they were not "managing or conducting the entertainment," and those are the only words in the section which could make them responsible.

The actions were entirely wrong, and the appeals must be dismissed with costs.

Appeals dismissed.

Solicitors: *Desborough, Son, & Prichard; Darley & Cumberland, for E. & H. Wilson, Leeds.*

W. L. C.

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Dec. 11, 12.

[IN THE COURT OF APPEAL.]

THE TRUSTEE OF JOHN BURNS-BURNS *v.* BROWN.

Bankruptcy—Title of Trustee—Act of Bankruptcy—Execution—Goods held by Sheriff for Twenty-one Days—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

By the Bankruptcy Act, 1883, s. 45, an execution creditor is not entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (i.e., by seizure and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor.

And by the Bankruptcy Act, 1890, s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been either sold or held by the sheriff for twenty-one days :—

Held, that the act of bankruptcy committed by reason of the sheriff's holding for twenty-one days the goods seized by him under an execution operates under s. 45 to make the execution itself void as against the trustee in bankruptcy of the debtor.

Figg v. *Moore* ([1894] 2 Q. B. 690) approved.

Ex parte Villars (Law Rep. 9 Ch. 432) distinguished.

Appeal by the defendants against the judgment of Vaughan Williams, J., upon an interpleader issue.

The issue was directed to try the question whether the proceeds of the sale of certain goods, which had been seized by the sheriff under a fi. fa. and sold, were the property of the plaintiff, as the trustee in the bankruptcy of John Burns-Burns, as against the defendants, who were execution creditors of the bankrupt.

On March 6, 1893, the defendants recovered a judgment in the Queen's Bench Division against the Thrapston Foundry Company for 428*l.* 7*s.* 7*d.* and costs.

The present plaintiff alleged that John Burns-Burns was the sole person carrying on business in the name of the company, and that the judgment was enforceable by execution against his property. The present defendants alleged that the business of the company really belonged to one Neilson, and that John Burns-Burns was a trustee for him.

On April 6, 1893, the judgment being unsatisfied to the extent of 386*l.* 8*s.* 1*d.*, the defendants issued a fi. fa., under which

the sheriff seized goods of the company. On April 8 the sheriff, by the instructions of the defendants, withdrew from possession, power being reserved to him to re-enter. On September 11, 1893, the sheriff re-entered, and again seized the goods under the fi. fa., and held the same for more than twenty-one days, of which the defendants had notice. The trustee alleged that the goods were the property of John Burns-Burns alone; the defendants alleged that the goods were the property of Neilson alone. On November 10, 1893, the goods were sold by the sheriff, and realized, after deducting costs, 189*l.* 14*s.* 6*d.* On November 11, 1893, a bankruptcy petition was presented against John Burns-Burns and on November 14 notice of this petition was served on the sheriff. On November 28, 1893, John Burns-Burns himself presented a bankruptcy petition, of which notice was given to the sheriff forthwith. On November 29, 1893, a receiving order was made on the debtor's own petition; and on the same day the first petition was by consent ordered to be withdrawn. On February 2, 1894, the debtor was adjudged a bankrupt; and on February 5 the plaintiff was appointed trustee in the bankruptcy. The 189*l.* 14*s.* 6*d.* was paid into Court to abide the determination of the issue.

Vaughan Williams, J., held, upon the evidence, that the goods seized were the sole property of John Burns-Burns, and that the plaintiff, as trustee, was entitled to the proceeds of sale.

The defendants appealed.

Herbert Reed, Q.C., and *Gore Browne*, for the defendants. The proper conclusion from the evidence is, that the business carried on in the name of the company belonged to Neilson alone. But, even if the goods were the sole property of John Burns-Burns, still the trustee in his bankruptcy is not entitled to them. A new act of bankruptcy was created by s. 1 (1) of the

(1) By s. 45 of the Bankruptcy Act, 1883: "(1.) Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2.) For the purposes of this Act,

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Bankruptcy Act, 1890—viz., the holding by the sheriff of goods which he has seized under a fi. fa. for twenty-one days; and it is said that, by virtue of s. 45 of the Bankruptcy Act, 1883, this act of bankruptcy, of which the defendants must be taken to have had notice, makes the execution invalid as against the trustee.

It was not, however, intended that this act of bankruptcy should operate as against the execution creditor himself to defeat his execution. It was, no doubt, held by Vaughan Williams, J., in *Figg* v. *Moore* (1), that this is the effect of the Act; but it is submitted that that decision was erroneous. It is inconsistent with the decision of this Court in *Ex parte Villars.* (2) In that case it was held, under the Bankruptcy Act, 1869, that an execution levied by seizure and sale, although it was an act of bankruptcy, was not necessarily void as regarded the execution creditor. The principle of that decision, as shewn by the judgment of Lord Cairns (p. 443), was, that such an act of bankruptcy is not a voluntary act, but in invitum, and that principle applies to the present case.

Lawson Walton, Q.C., and *Edward Clayton*, for the trustee, were not called upon.

C. T. Collins, for the sheriff.

LORD HALSBURY (after stating that upon the facts he came to the conclusion that the business of the company belonged to John Burns-Burns alone), continued:—As to the other point, it seems to me too clear for argument. I think it is expressly determined by s. 45 of the Bankruptcy Act, 1883, which provides that an execution creditor shall not be entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (that is, by seizure

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an execution against goods is completed by seizure and sale."

By s. 1 of the Bankruptcy Act, 1890, "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

(1) [1894] 2 Q. B. 690.

(2) Law Rep. 9 Ch. 432.

and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor. If while the sheriff has the goods in his possession an available act of bankruptcy comes to his knowledge, it is his duty to hold the goods for the creditors generally, not for the execution creditor. The present question could not have arisen under the Bankruptcy Act, 1883, itself. But the Bankruptcy Act, 1890, s. 1, has created a new act of bankruptcy, viz., the holding of the goods by the sheriff under an execution for twenty-one days. I cannot read in the Act anything which exempts the execution creditor himself from the operation of this clause. In the present case the sheriff had possession of the goods in question for more than twenty-one days. To my mind, it is clear that an act of bankruptcy was thus committed to the knowledge of the execution creditors, and the sheriff had notice of it. The result is that, under the combined operation of the Bankruptcy Acts of 1883 and 1890, all the conditions existed which are necessary to give the trustee in the bankruptcy a title to the goods. Putting the two sections together, the point taken by the appellants appears to me unarguable. On both grounds I think the appeal should be dismissed, and with costs.

LINDLEY, L.J. I am of the same opinion. I am satisfied upon the evidence that the business was really that of John Burns-Burns alone. As to the other point, it is contended that the decision of Vaughan Williams, J., in *Figg* v. *Moore* (1) was erroneous, and that, even if my conclusion on the facts is right, the trustee in the bankruptcy is not entitled to the goods. In my opinion, that decision was perfectly right, and I agree in the reasons which the learned judge gave. I do not see how it is possible to construe the Act of 1890 in any other way. *Ex parte Villars* (2) was decided upon a different Act, and it is not applicable to the altered state of the law.

A. L. SMITH, L.J. I am of the same opinion upon the question of fact. With regard to *Figg* v. *Moore* (1), s. 45 of the Bankruptcy Act, 1883, and s. 1 of the Bankruptcy Act, 1890,

(1) [1894] 2 Q. B. 690. (2) Law Rep. 9 Ch. 432.

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taken together, shew that that case was rightly decided. Sect. 1 of the Act of 1890 makes the holding of the goods by the sheriff for twenty-one days an act of bankruptcy. Here the goods in question were held by the sheriff for twenty-one days. I turn now to sect. 45 of the Act of 1883, and see what in these circumstances is to happen. By this section an execution creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor if, before the completion of the execution, he has notice of the commission of any available act of bankruptcy by the debtor. It is clear in this case that the defendants had notice of an available act of bankruptcy committed by the debtor before the execution was completed, for they themselves put in the execution, and must be taken to have had notice that the sheriff had held the goods for twenty-one days. The case is, therefore, brought entirely within s. 45, and I think that *Figg* v. *Moore* (1) was rightly decided. *Ex parte Villars* (2) does not apply.

Appeal dismissed.

Solicitors: *Thos. A. Jones; Ward, Perks, & McKay; Samuel Price & Sons.*

W. L. C.

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IN RE HEWETT. EX PARTE LEVENE.

Bankruptcy—Bankruptcy Notice—Judgment against Married Woman—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules* 1886, *r.* 136—*Appendix, Form No.* 6.

A judgment recovered against a married woman does not, upon the death of her husband, render her personally liable to pay the judgment debt, so as to entitle the judgment creditor to issue a bankruptcy notice against her upon such judgment.

APPEAL from county court of Hampshire, holden at Portsmouth.

In December, 1888, judgment was recovered in the Chancery Division of the High Court by Solomon Levene against the debtor—a married woman—and her husband, James Hewett, for a sum to be ascertained by the chief clerk's certificate, which sum was ultimately certified in July, 1893, at 1023*l.* 3*s.* 8*d.* In August,

(1) [1894] 2 Q. B. 690. (2) Law Rep. 9 Ch. 432.

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1893, execution was issued upon that judgment, and a return of nulla bona was made by the sheriff. In April, 1894, James Hewett, the husband, died. On May 15, 1894, a bankruptcy notice was served by the judgment creditor upon the debtor, under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, requiring her to pay or compound for the amount of the judgment debt. On May 23, 1894, a petition was presented to the county court of Hampshire by the judgment creditor against the debtor, alleging as the act of bankruptcy non-compliance with the above notice.

The registrar dismissed the petition on the ground that he had no jurisdiction to make a receiving order against a woman who was married at the date of the judgment, even though her husband had died in the interval between such judgment and the presentation of the petition. The judgment creditor appealed.

Muir Mackenzie, for the appellant. The registrar had jurisdiction to make the order. The alleged act of bankruptcy being non-compliance with a bankruptcy notice, his jurisdiction depends upon the validity of the notice. Such a notice must be in Form No. 6 in the appendix to the Bankruptcy Rules, which form requires the debtor to pay the judgment debt within a certain specified time. The applicability, then, of a bankruptcy notice to a judgment against a married woman in the form in *Scott* v. *Morley* (1) depends upon whether a judgment in that form is a judgment against her personally. It is contended that it is. No doubt during her coverture execution can be issued on such a judgment only against her separate property, not subject to restraint on anticipation; but, subject to that limitation, the judgment debt is one which she is personally liable to pay. This was decided in the Court of Appeal in *Holtby* v. *Hodgson* (2), where it was held that a debt due to a married woman might be attached to satisfy a judgment recovered against her, although it is the very foundation of the jurisdiction in garnishee proceedings that the party to whom the debt sought to be attached is due should be a "debtor liable under

(1) 20 Q. B. D. 120, at p. 132. (2) 24 Q. B. D. 103.

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a judgment": see Order XLV. Lord Esher, M.R., Lindley and Lopes, L.JJ., there distinctly laid it down that a judgment against a married woman was not merely a judgment against her separate estate, but a judgment against her personally, and this view was adhered to by Lopes and Kay, L.JJ., in *Pelton* v. *Harrison* (No. 2). (1) That being so, when, upon the death of the husband, the limitation as to the class of property against which execution can issue is removed, the judgment becomes equivalent to a judgment against a feme sole. In *Holtby* v. *Hodgson* (2) Lindley, L.J., said, "Suppose her husband were to die, the restraint would be gone, the judgment would bind her, and execution could be issued upon it." Upon her becoming a widow, therefore, a bankruptcy notice may be properly issued against her. No doubt the bankruptcy notice must follow the form of the judgment; but the limitation in the form of judgment in *Scott* v. *Morley* (3) as to the class of property out of which the debt is to be payable, and against which execution is to issue, must be read as confined to the period of coverture. It is clear that that form cannot be read strictly without any limitation at all; for, if it were so read, it would lead to this absurdity—that upon the death of the husband the wife would be free from all liability upon the judgment, even in respect of her separate property, for what was during the coverture her separate property would, upon the husband's death, cease to answer that description. The decision in *In re Lynes, Ex parte Lester* (4), to the effect that a bankruptcy notice cannot be issued against a married woman, is quite consistent with the present contention, for there the debtor was still a married woman at the date of the notice.

Carrington, for the debtor. The decision of the Court of Appeal in *In re Lynes, Ex parte Lester* (4), covers the present case, for no substantial distinction can be drawn between the position of a married woman and that of a widow under a judgment in the form of *Scott* v. *Morley*. (3) The fact that the death of the husband removes the restraint on anticipation does not make the property of the wife, which was subject to the restraint, liable to

(1) [1892] 1 Q. B. 118.
(2) 24 Q. B. D. 103, at p. 108.
(3) 20 Q. B. D. 120, at p. 132.
(4) [1893] 2 Q. B. 113.

execution under a judgment obtained during the coverture. The dictum of Lindley, L.J., in *Holtby* v. *Hodgson* (1) is incorrect. The contrary was expressly decided by the Court of Appeal in *Pelton* v. *Harrison* (No. 1). (2) A judgment recovered against a married woman is a judgment only against her separate estate and not against her personally. On that point the opinions of Bowen, L.J., in *Scott* v. *Morley* (3), of Kay, L.J., in *Pelton* v. *Harrison* (No. 1) (2), and of Lord Esher, M.R., Lopes and Smith, L.JJ., in *In re Lynes, Ex parte Lester* (4), are to be preferred to those of Lord Esher, M.R., Lindley and Lopes, L.JJ. in *Holtby* v. *Hodgson* (5), and Lopes and Kay, L.JJ., in *Pelton* v. *Harrison* (No. 2). (6)

Muir Mackenzie, in reply.

VAUGHAN WILLIAMS, J. This is an appeal from a decision of the registrar of the Portsmouth County Court refusing to make a receiving order against a widow named Hewett. Now, the debt upon which the petition was based was a debt upon a judgment recovered against Mrs. Hewett and her husband, and the act of bankruptcy alleged was the non-compliance with a bankruptcy notice requiring Mrs. Hewett to pay that debt. I am of opinion that no bankruptcy notice could properly be issued against her upon that judgment. It was not disputed that if her husband had not died, and she had continued to be a married woman, no such bankruptcy notice could have been issued. For that much is concluded by the decision of the Court of Appeal in *In re Lynes, Ex parte Lester* (4), where it was held that although a judgment against a married woman may in one sense be said to be a personal judgment, it is not such a judgment as that under it you can call upon the married woman personally to pay. For a judgment against a married woman must be in the form given in *Scott* v. *Morley* (7), and according to that form, "It is adjudged that the plaintiff do recover £—— and costs against the defendant, such sum and costs to be

(1) 24 Q. B. D. 103, at p. 108.
(2) [1891] 2 Q. B. 422.
(3) 20 Q. B. D. 120, at p. 128.
(4) [1893] 2 Q. B. 113.
(5) 24 Q. B. D. 103.
(6) [1892] 1 Q. B. 118.
(7) 20 Q. B. D. 120, at p. 132.

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Vaughan Williams, J.

payable out of her separate property as hereinafter mentioned, and not otherwise. It is ordered that execution hereon be limited to the separate property of the defendant not subject to any restriction against anticipation." That judgment orders the judgment debt to be paid, not by the married woman herself, but out of a certain limited class of property if she has any such. From which it follows that a bankruptcy notice cannot be issued upon a judgment in that form, for the bankruptcy notice must call upon the debtor personally to pay. But it was contended that although that is true where the debtor continues to be a married woman at the date of the notice, it is not true where the debtor prior to the issue of the notice has become a widow. That depends upon whether upon her becoming a widow execution could be issued against her upon the judgment as it stands. Reliance was placed upon the doctrine of Lindley, L.J., in *Holtby* v. *Hodgson* (1) to the effect that upon the death of the husband such an execution could issue. He says: "Suppose her husband were to die the restraint would be gone, the judgment would bind her, and execution could be issued upon it." If that is right, I agree that Mr. Mackenzie's contention would be sound. But I think it is not right. It seems to me that the cases of *Beckett* v. *Tasker* (2) and *Pelton* v. *Harrison* (No. 1) (3) are both authorities to shew that the death of the husband does not convert a judgment in the form in *Scott* v. *Morley* (4) into a judgment upon which the widow can be personally called upon to pay.

KENNEDY, J. I entirely concur. I can see no substantial distinction between the present case and that of *In re Lynes, Ex parte Lester.* (5)

Appeal dismissed.

Solicitor for the petitioning creditor: *M. Moseley.*
Solicitors for the debtor: *Goble & Warner.*

(1) 24 Q. B. D. 103, at p. 108.
(2) 19 Q. B. D. 7.
(3) [1891] 2 Q. B. 422.
(4) 20 Q. B. D. 120, at p. 132.
(5) [1893] 2 Q. B. 113.

J F. C.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 7.

IN RE ISAACSON. EX PARTE MASON.

Bill of Sale—Validity—Registration—Statutory Form—Assignment by same Deed of Chattel and Hire and Purchase Agreement affecting it—Severability of Subject-matter—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By one and the same deed the owner of a piano assigned, by way of security for money, the piano, and also the benefit of a hire and purchase agreement into which he had entered respecting it:—

Held, that the assignment of the agreement was severable from that of the piano, and that, consequently, the deed was not void in toto under the Bills of Sale Acts for non-registration, or because it was not in the statutory form.

APPEAL by the trustee in the bankruptcy of B. P. Isaacson, against an order of a Divisional Court (Vaughan Williams and Kennedy, JJ.), which affirmed an order made by the judge of the county court at Newport, Monmouthshire, whereby he refused an application by the trustee for a declaration that certain assignments made by the bankrupt to Edward Bishop were void, on the ground that they were bills of sale and had not been registered, and were not in the statutory form.

The bankrupt had carried on business as a seller of musical instruments. He was in the habit of selling pianos upon what is called the "hire-purchase" system. He assigned to Bishop a number of these hiring agreements and the instruments comprised in them, and it was these assignments which the trustee alleged to be void. The assignments were in form absolute; but it was admitted that they were in fact only securities for the amounts specified in them respectively. The hiring agreements and the assignments respectively were all similar in form, and it is only necessary to give a specimen of each.

By an agreement dated May 2, 1892, and made between Isaacson (the bankrupt) (thereinafter called the owner) of the one part, and Thomas Yeomens (thereinafter called the hirer) of the other part, the owner agreed at the request of the hirer

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to let on hire to him a pianoforte No. 37,714, maker Brinsmead. And in consideration thereof the hirer agreed—

"(1.) To pay the owner on May 2, 1892, a rent or hire instalment of 5*l.*, and 4*l.* 10*s.* on the 2nd of each succeeding quarter;

"(2.) To keep and preserve the said instrument from injury (damage by fire included);

"(3.) To keep the said instrument in the hirer's own custody, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing.

"(4.) That, if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring, and retake possession of the said instrument. And for that purpose leave and licence is hereby given to the owner (or agent and servant, or any other person employed by owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake possession of the said instrument, without being liable to any suit, action, indictment, or other proceeding by the hirer, or any one claiming under said hirer.

"(5.) That, if the hiring should be terminated by the hirer (under clause A below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return, or set-off for payments previously made.

"The owner agrees—

"(A) That the hirer may terminate the hiring by delivering up to the owner the said instrument.

"(B) If the hirer shall punctually pay the full sum of 71*l.* 8*s.*, by 5*l.* at date of signing, and by quarterly instalments of 4*l.* 10*s.* in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

"(C) Unless and until the full sum of 71*l.* 8*s.* be paid the said instrument shall be and continue to be the sole property of the owner."

By a deed dated February 11, 1893, and made between Isaacson of the one part, and Bishop of the other part, in consideration of 25*l.*, Isaacson, as beneficial owner, did thereby

assign unto Bishop, his executors, administrators, and assigns, the piano numbered 37,714, and also an agreement for hire dated May 2, 1892, and made between T. Yeomens of the one part, and Isaacson of the other part, relating to the said piano, and the full benefit and advantage thereof, to hold unto Bishop, his executors, administrators, and assigns, absolutely. And Isaacson did thereby covenant with Bishop that he (Isaacson) would not do or knowingly suffer anything whereby Bishop, his executors, administrators, or assigns might be prevented from receiving all moneys payable under the said agreement. And Isaacson thereby covenanted with Bishop that the sum of 32*l.* 18*s.* remained owing under the hiring agreement.

The learned judge held, on the authority of *In re Burdett* (1) and *Cochrane* v. *Entwistle* (2), that the assignment of the hiring agreement was severable from that of the piano, and that, even if the assignment of the piano itself was void, the deed would remain good as regarded the assignment of the hiring agreement, which was a chose in action, not a personal chattel.

The trustee in the bankruptcy appealed to the Divisional Court.

His appeal was dismissed, and he (with leave) appealed to the Court of Appeal.

Moulton, Q.C., and *F. Cooper Willis*, for the trustee. The assignment to Bishop is a bill of sale within the Bills of Sale Acts as it is "assurance of personal chattels," and it is void under the Bills of Sale Acts because it is not registered, and also because it is not in the statutory form prescribed by the Bills of Sale Act, 1882. The hiring agreement is so intimately connected with the piano itself that the assignment of the one cannot be separated from the assignment of the other, and the deed is void in toto. The assignment is of the piano burdened with the hiring agreement. The owner cannot take possession of the piano until there has been some breach of the hiring agreement. In *In re Davis & Co.* (3) the benefit of a hiring agreement was assigned without any assignment of the chattels

(1) 20 Q. B. D. 310. (2) 25 Q. B. D. 116.
(3) 22 Q. B. D. 193.

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to which it related, and it was held that the assignment was not a bill of sale. But the main question there was, whether the licence given by the hirer to the owner to enter and take possession of the chattels was capable of being assigned, and it was held that it was not. In order that the deed should be severable into two parts, one of which is void under the Bills of Sale Acts and the other is not, the things assigned must be in their nature distinct: *In re Burdett* (1); *Cochrane* v. *Entwistle.* (2) That is not so in the present case. If the piano were assigned alone, the assignment would necessarily carry with it many of the rights of the owner under the hiring agreement. An assignment of the piano, followed by an assignment on a subsequent day of the hiring agreement, would have a different effect from an assignment of the agreement first and a subsequent assignment of the piano. The two things cannot be severed when they are assigned together, and consequently the assignment is entirely void.

Herbert Reed, Q.C., and *Johnston Watson*, for the grantee. The assignment is void only so far as it is an assurance of personal chattels. The assignment of the agreement is severable from that of the piano itself. The case is governed by *In re Burdett* (1) and *Cochrane* v. *Entwistle.* (2) The judge of the county court only decided that the deed was not void in toto. He left it open to the trustee to assert such right as he might have to the piano. The Divisional Court simply dismissed the appeal, and if this Court dismisses the appeal the question whether the trustee is entitled to the piano will still remain open.

[They were stopped by the Court.]

Moulton, Q.C., in reply. The assignment of the piano and the assignment of the agreement overlap each other, and they cannot be severed.

LORD ESHER, M.R. In this deed, which is said to be a bill of sale, there is an assignment of a piano—that is, of a personal chattel. The meaning of that is, that it assigns the property in the piano. If that assignment stood alone, it would give to the assignee all the proprietary rights in the piano, whatever they

(1) 20 Q. B. D. 310. (2) 25 Q. B. D. 116.

may be. But there is also in the deed an assignment of a hiring agreement relating to the piano. If this agreement conferred only the proprietary rights the assignment of it would be mere surplusage. But the agreement contains other stipulations which are not merely proprietary, and these are contractual rights. Any rights which the agreement gives in addition to proprietary rights are contractual rights. There are, therefore, two distinct things in the deed—an assignment of proprietary rights, and an assignment of contractual rights. Then arises the question under the Bills of Sale Acts, whether the assignment can be applied separately to the proprietary rights and to the contractual rights. If the assignment of the contractual rights had been made by a separate deed, the Bills of Sale Acts would clearly not have applied to it. I cannot see how two things which are thus distinct can be said to be inseparable. Independently of authority, I should have thought that, when a deed assigns two things which give different rights and remedies, and which might have been assigned by different instruments—and one only of those things comes within the description of "personal chattels"—the Bills of Sale Acts would not operate to make the deed void in toto, but would only affect its validity as regards the personal chattels. But I think the point is covered by the cases which have been cited. I think the two subject-matters can be severed, and that the Bills of Sale Acts can be applied to the one, leaving the validity of the other untouched. I think this is the result of what was said by Fry, L.J., and Lopes, L.J., in *Cochrane* v. *Entwistle*. (1) Their observations appear to me to apply exactly to the present case. In my opinion, the appeal must be dismissed.

LOPES, L.J. It seems to me that the test whether there is something in a deed to which the Bills of Sale Acts apply, and something to which they do not apply, is to look at the deed itself and see what its effect is. Here there are two distinct things comprised in the deed—the piano and the proprietary rights incident to it, and the contractual rights appurtenant to it under the hiring agreement. I do not know any better test

(1) 25 Q. B. D. 116.

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Lopes, L.J.

than this. The piano might have been assigned by one instrument to A. on one day, and the contractual rights under the hiring agreement might have been assigned by another instrument to B. on another day. Therefore, as it seems to me, when the two assignments are comprised in one instrument they can be severed, so that the Bills of Sale Acts may apply to the one and not to the other. It has been distinctly decided that a deed may be void as to part of it while it remains good as to the rest of it, provided that the subject-matter is so described as to be severable. In the present case, I think the subject-matter of the deed can be thus severed; and consequently the county court judge was right in deciding that the assignment is not wholly void.

RIGBY, L.J. No question is raised as to the validity of the hiring agreement itself. It is not alleged that it is a bill of sale, though Mr. Moulton's ingenious argument has gone a long way to shew that it might be a bill of sale. The question is as to the validity of the assignment of the hiring agreement. The deed purports to assign first the piano, i.e., the proprietary rights attached to it, and secondly the hiring agreement and the contractual rights given by it to the owner of the piano. I think that the piano could be struck out of the deed without affecting the assignment of the hiring agreement, and then there could be no question as to the validity of the assignment of the agreement. The assignment of the agreement is severable from that of the piano, and the principle of *In re Burdett* (1) applies. The decision of the county court judge was quite right.

Appeal dismissed.

Solicitors: *H. Stanley Sugden; Walter Maskell.*

(1) 20 Q. B. D. 310.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 4, 5.

ALABASTER AND OTHERS *v.* HARNESS AND OTHERS.

Maintenance of Suit—Action for Libel—Reflection on Character of Person other than Plaintiff—Common Interest.

In order to justify maintenance by one person of the suit of another, there must either be a common interest recognised by the law in a matter at issue in the suit, or the case must fall within one of the specific exceptions from the law against maintenance established by the authorities.

The defendant, being interested in the sale of certain electrical appliances for the treatment of disease, employed one T. as an expert to report thereon. T. reported favourably on the appliances. The plaintiffs, the proprietors of a newspaper, subsequently published an article commenting adversely upon T.'s report and the appliances in question, and casting reflections on T.'s qualifications as an expert, and on his conduct and that of the defendant in connection with the report and the sale of such appliances. T. brought an action for libel against the plaintiffs in respect of this article at the instigation of the defendant, who found money for the purposes of the action. The action resulted in a verdict and judgment for the defendants therein, the present plaintiffs, who thereupon sued the defendant for maintenance, claiming as damages the costs they had incurred in defending the action for libel, which T. was unable to pay:—

Held, that the action was maintainable on the ground that the defendant had no common interest with T. in the action for libel, and therefore was not entitled to maintain him in bringing and prosecuting that action.

APPEAL from the judgment of Hawkins, J., at the trial without a jury. (1)

The action was one of maintenance brought by the plaintiffs, the proprietors of a newspaper called the *Electrical Review*, against the defendant Harness and the Medical Battery Company, Limited, of which company Harness was managing director. The company having gone into liquidation, the action did not proceed as against them. The judgment of the learned judge fully states the facts as found by him. For the purposes of this report the facts may be summarized as follows. The Medical Battery Company, Limited, was incorporated for the purpose of carrying out the treatment of diseases by means of electric and magnetic appliances, and they manufactured and dealt in such appliances. One Dr. Tibbits had been employed by the defendants as an electrical

(1) [1894] 2 Q. B. 897.

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expert to report upon their apparatus and appliances, and had made a report the effect of which was favourable thereto. This report the defendants published in the form of a pamphlet.

The plaintiffs subsequently published an article commenting adversely upon the report and the defendants' appliances, and casting serious reflections upon Dr. Tibbits' qualifications as an expert, and upon his conduct and that of the defendants Harness and the company in connection with the report and the sale of such appliances.

In respect of this article Dr. Tibbits brought an action for libel against the plaintiffs. It appeared from the evidence that that action was instigated by the defendant Harness, who employed a solicitor nominated by himself to conduct the case, and found money for the purposes of the action. The action by Dr. Tibbits was tried before Mathew, J., and resulted in a verdict and judgment for the then defendants, the present plaintiffs, with costs, on the ground that the article did not exceed the limits of fair comment on a matter of public interest. Those costs Dr. Tibbits was unable to pay, and the present action was subsequently brought to recover the amount of them as damages, on the ground that the defendants had unlawfully maintained Dr. Tibbits in bringing and prosecuting his action. The learned judge gave judgment for the plaintiffs.

Jelf, Q.C., and *F. Dodd*, for the defendant Harness. The case comes within a well-established exception from the rule against maintenance, inasmuch as the defendant had a common interest with Dr. Tibbits in the result of the action by the latter. The plaintiffs' article was an attack upon Dr. Tibbits' conduct in associating himself with a person like the defendant. It was also an attack upon a report made by Dr. Tibbits favourable to the defendant's appliances, and upon Dr. Tibbits' qualifications as an expert. The character of the defendant and that of his appliances were therefore indirectly in issue, and he had an interest in defending them. Again, the defendant, having employed Dr. Tibbits as an expert to make a report, and incurred expense in publishing the report in the form of a pamphlet, was interested in the maintenance of Dr. Tibbits' reputation.

No one could doubt that a verdict against Dr. Tibbits in his action would prejudicially affect the reputation of the defendant and his appliances, and would render the pamphlet valueless; while a verdict in his favour would tend to maintain the reputation of the defendant and his appliances. The defendant, therefore, had an interest in "the thing in variance," to use the words of Hawkins' Pleas of the Crown, bk. 1, c. 27, title Maintenance, s. 13.

It is contended that the result of the authorities is that a belief on reasonable grounds in the existence of a common interest is sufficient to justify maintenance, although no interest recognised by law exists. The general principle which underlies all the exceptions from the rule against maintenance to be found in the books is that, in order to constitute maintenance, there must be a mens rea, something in the nature of an immoral motive; the defendant must in maintaining the action have been doing something which he must or ought to have known to be morally wrong. There is nothing immoral in a man's defending an interest which he bonâ fide and on reasonable grounds believes himself to possess. Maintenance is spoken of in the old authorities on the subject as criminal. There was nothing unreasonable on the defendant's part in supposing that he had an interest in the result of the action, and he therefore was morally justified in maintaining Dr. Tibbits in carrying it on. [They cited *Bradlaugh* v. *Newdegate* (1); *Wallis* v. *Duke of Portland* (2); *Fisher* v. *Kamala Naicker* (3); *Harris* v. *Brisco* (4); *Findon* v. *Parker* (5); *Anderson* v. *Radcliffe* (6); *Metropolitan Bank* v. *Pooley* (7); Hawkins' Pleas of the Crown, bk. 1, c. 27, title Maintenance, ss. 1, 11, 12; Co. Litt. 368 (b); Termes de la Ley, p. 422.]

Lawson Walton, Q.C., and *J. E. Bankes*, for the plaintiffs, were not called upon.

LORD ESHER, M.R. This appears to me to be a perfectly clear case. The action against the defendant is for maintenance of

(1) 11 Q. B. D. 1.
(2) 3 Ves. 494.
(3) 8 Moore's Ind. Ap. Ca. 170.
(4) 17 Q. B. D. 504.
(5) 11 M. & W. 675.
(6) E. B. & E. 819.
(7) 10 App. Cas. 210.

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Lord Esher, M.R.

Dr. Tibbits in an action brought by him against the plaintiffs. The action so brought by Dr. Tibbits was an action for a libel on himself. Such an action is a personal action, which in point of law only concerns the person who brings it. The matters legally at issue in it are whether the plaintiff has been libelled, and, if so, to what damages he is entitled in respect of the libel upon himself. It has nothing whatever to do with any libel that may have been published of some other person, or damages for such libel. The evidence, in my opinion, justifies the conclusion at which the learned judge appears to have arrived, viz., that the defendant suggested to Dr. Tibbits to bring the action, and employed a solicitor to conduct the same at his own expense. He therefore instigated Dr. Tibbits to bring, and provided the money for carrying on, an action, which concerned Dr. Tibbits only, and the result of which could not in any legal point of view affect any right of the defendant. The question is whether in so doing he was guilty of maintenance. The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by Lord Loughborough in *Wallis* v. *Duke of Portland* (1), and more elaborately by Lord Coleridge, C.J., in *Bradlaugh* v. *Newdegate* (2), does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. Lord Loughborough, in *Wallis* v. *Duke of Portland* (1), says that the rule is, "that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense." But the law from the earliest times has countenanced some relaxation of the utmost strictness of that rule; and some particular cases have been specifically allowed as constituting excuses for that interference in the suit of another which would otherwise have amounted to maintenance.

(1) 3 Ves. 494. (2) 11 Q. B. D. 1.

There are some cases in which a landlord has been allowed to maintain his tenant in a litigation. It matters not, as it appears to me, for what reason this exception was made. It must be treated now as an exception founded upon specific authority, which all Courts have adopted on the strength of that authority. Then there is the exception which has been made on the ground of charity. There are other exceptions. All of them are exceptions which from early times have been specifically allowed, and which have been carried into the text-books on the subject; but, if a case is not within any one of these specific exceptions established by authority, it seems to me difficult to say otherwise than that it must fall within the strict rule. If, however, it is open to us to go beyond the exceptions which have been specifically allowed, I should adopt the rule indicated as the result of the cases by Lord Coleridge, C.J., in *Bradlaugh* v. *Newdegate* (1), where he says: "But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion gives a man in behalf of a poor man, who but for the aid of his rich helper could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them." The present case is clearly not within the grounds of exception there mentioned by Lord Coleridge, and it is within the general rule enunciated by Lord Loughborough in *Wallis* v. *Duke of Portland*. (2) I am not disposed to extend the exceptions from the rule against maintenance, and the present case appears to me to be as strong a case of maintenance as could be. The defendant instigated an action, the verdict in which could not affect him, on account of some fancied interest which was not an interest at all. Adopting the test laid down by Lord Coleridge, C.J., I think that the only interest which could have justified him in what he did would be some interest recognised by the law in some matter at issue in the suit. The defendant had no such interest. For these reasons, I think the appeal must be dismissed.

(1) 11 Q. B. D. 1, at p. 11.

(2) 3 Ves. 494.

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LOPES, L.J. I entirely agree with the elaborate judgment given by Hawkins, J., in the Court below. The defendant in this case was, in my opinion, clearly guilty of maintenance. The grounds on which the law against maintenance is based are well defined by Lord Abinger, C.B., in *Prosser* v. *Edmonds* (1), where he says: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." It is said that in this case the defendant was justified in his maintenance of Dr. Tibbits' action because he had a common interest with him. In my opinion, he had no such common interest as could justify his interference in the action. In order to justify such interference on the ground of common interest, I think there must be some interest recognised by the law in what is called by Hawkins in his Pleas of the Crown "the thing in variance"; by which I understand an interest in the subject-matter of the action at issue between the parties. In my opinion, there must be some legal, as distinguished from a sentimental, interest in the result of the action about to be tried, or in some question at issue between the parties in the action. The matter in issue in the action brought by Dr. Tibbits was whether the plaintiffs had libelled him. No question arose as between the defendant and the plaintiffs. It seems to me that it would be strongly against public policy that in such a case persons who have no interest whatever in the action, and who cannot be affected by the verdict in it, or made liable to pay costs, should be allowed to assist another person in maintaining it against the plaintiffs, as the defendant has done. The ground on which the defendant's conduct was sought to be justified was, as I have said, the existence of a common interest. There are no doubt other cases recognised by the law as exceptions from the rule against maintenance, such as those of consanguinity, affinity, charity, and the relation of master and servant, none of which are here in question. These are exceptions which have been long introduced and are well recognised; but I must say that I should be sorry to see any new exceptions engrafted on the rule.

(1) 1 Y. & C. 481.

RIGBY L.J. I am of the same opinion. The action, in respect of which maintenance is alleged, was upon the evidence not really brought by Dr. Tibbits, or at any rate it was only brought by him at the instigation of the defendant, and upon a promise of assistance in respect of the costs of the action. It has been urged that in that action questions incidentally arose which might affect the defendant, and it would be a hardship therefore if he were not allowed to see that the action was properly conducted, in order to get the advantage of a favourable finding on these questions. But it appears to me that the hardship, if any, is entirely the result of his own illegal conduct in causing the action to be commenced. It was further contended that in the state of facts that existed he might have an excuse for supposing that he had an interest in the action and therefore was entitled to interfere. I do not feel called upon in this case to attempt the difficult task of defining what constitutes maintenance. The general rule is clear and has been laid down over and over again in the authorities on the subject. The difficulty arises on account of the very various exceptions which have been allowed by judicial decisions to be defences where the general rule has been violated. I am unable to reduce those exceptions to any simple rule. We were asked by the defendant's counsel to say that the various exceptions from the rule could all be accounted for by saying that a mens rea was essential to maintenance, i.e., that there could be no infringement of the law against maintenance unless it was shewn that the particular defendant had done something which he knew to be wrong; for it was argued that, though what he did was really wrong, if he believed it to be right, it was enough. That argument seems to me to go so far as to defeat itself. I am content to express a general concurrence with the passage cited by the Master of the Rolls from the judgment of Lord Coleridge C.J., in *Bradlaugh* v. *Newdegate* (1), with regard to what constitutes an excuse for maintenance, subject, however, to a qualification which the Chief Justice would himself, I think, have acquiesced in, if indeed it is not really to be implied from what he said. I should say that, in

(1) 11 Q. B. D. 1.

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Rigby L.J.

order to excuse maintenance, there must either be some interest as described by the Lord Chief Justice, or the case must be one of those which have been specifically decided to be exceptions from the general rule. I say this with special reference to the fact that one of those cases is that in which an heir-at-law maintains the title of the person in possession. There, if such person has no title, his heir would have no legal interest, but only a spes successionis. But that kind of case has been specifically decided to come within the exceptions from the general rule against maintenance. The present case appears to me to be a very clear case of maintenance which does not fall within any of the exceptions from the general rule against maintenance. I cannot accept the contention that, whenever questions which affect a person not a party to an action incidentally arise in the action, the case falls within the exception from the rule as being one where there is a common interest. In any case I should have grave doubts whether a person who is really the author of the litigation could claim the benefit of an exception depending on the fact that in an action which he has himself instigated certain questions affecting him may incidentally arise.

Appeal dismissed.

Solicitors for plaintiffs: *Lewis & Lewis.*
Solicitor for defendants: *Richard Furber.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 6.

HANFSTAENGL *v.* THE AMERICAN TOBACCO COMPANY.

International Copyright—Literary or Artistic Work produced in a Foreign Country—Infringement of Copyright in England—Right of Owner to Sue without Registration in England—Country where Painting first Produced—Publication of Painting—Country of Origin—Order in Council, November 28, 1887, *adopting the Berne Convention of September* 5, 1887—*Fine Arts Copyright Act*, 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 4, 12—*International Copyright Act*, 1886 (49 *&* 50 *Vict. c.* 33), *ss.* 4, 11.

By s. 4 of the International Copyright Act, 1886, "Where an Order (in Council) respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the Order."

The Order in Council of November 28, 1887, adopting the Berne Convention of September 5, 1887, contains no provisions with respect to the registry and delivery of copies of works produced in a foreign country, and consequently registration under the Fine Arts Copyright Act, 1862, is not necessary to entitle the owner of the English copyright in a foreign painting to sue for infringement.

Hanfstaengl Art Publishing Co. v. *Holloway* ([1893] 2 Q. B. 1) approved.

Fishburn v. *Hollingshead* ([1891] 2 Ch. 371) disapproved.

By s. 11 of the International Copyright Act, 1886, "The expression 'produced' means, as the case requires, published or made, or, performed or represented."

The word "published" is applicable to a painting, and the country where it is first published is the country of origin mentioned in article 2 of the Convention of Berne, so that compliance with the conditions and formalities prescribed by the law of the country where the painting is first published gives the owner the right to sue for infringement in this country.

APPEAL from a judgment of Pollock B., at the trial of the cause without a jury.

The action was brought to restrain the defendants from printing, publishing, selling, or distributing for show-cards, or otherwise, copies or colourable imitations of the plaintiff's copyright work, "The Love Letter"; for forfeiture and delivery up of all blocks and copies of the copyright work; and for damages. At the trial it appeared that the picture was painted in Italy by an Italian artist, and sold to a dealer at Munich. The copyright in the picture was assigned to the plaintiff at Munich, and it was

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admitted that in Germany no registration of works of art is required to protect the owner of the copyright. It was also admitted that in Italy such registration is required, and that it had not been effected in regard to this picture. The defendants were wholesale dealers in tobacco in America carrying on business with retail dealers in, among other places, England. Copies of the picture were printed in New York as a show-card, and were distributed among retail tobacconists in England as an advertisement of the defendants' goods. The contention of the plaintiff was that the picture was first published in Germany by means of copies and photographs, and subsequently in England, and that the distribution by the defendants of copies in England was an infringement of the plaintiff's copyright in this country. The defendants contended that publication had taken place in Italy; but the question whether it had taken place there or in Germany was not determined at the trial, as the learned judge was of opinion, on the construction of the International Copyright Act, 1886, that the picture, having been made in Italy, must be taken to have been first produced there, and that, as it had not been registered in Italy, the copyright was not protected, and there had been no infringement by the publication of the copies in England. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Dickens, Q.C., and *R. M. Bray*, for the plaintiff. The learned judge misconstrued the word "produced" in s. 2, sub-s. 3, of the International Copyright Act, 1886. (1) The expression "produced" is interpreted by s. 11 of the Act to mean "as the case requires, published or made, or, performed or represented." The learned judge held that, construing the interpretation section reddendo singula singulis, in the case of an artistic work such as a painting, "produced" meant "made"; in the case of a literary or dramatic work it meant "published" or "repre-

(1) The International Copyright Act, 1886, s. 2, sub-s. 3, enacts: "The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced."

sented," as the case might be. It is contended that the Act ought to be construed with reference to the Berne Convention, which, according to the preamble, it was passed to carry into effect, the provisions of the previous International Copyright Acts not being wide enough for that purpose. That convention provides for international copyright between certain countries called in the convention "the union" in respect of "literary and artistic works." Article 2 of the convention provides in substance that authors of any of the countries of the union shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws give to natives; and that the enjoyment of those rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and shall not exceed in the other countries the term of protection granted in the "country of origin." It further provides that the "country of origin" of the work is that in which the work is first "published," or, if such publication takes place simultaneously in several countries of the union, that one of them in which the shortest term of protection is granted by law. By article 4, the expression "literary and artistic works" comprehends, inter alia, works of painting—"in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction." The convention therefore in terms says that in the case of both literary and artistic works, if the work has been published, regard is to be had to the law of the country where the work is first published. The construction put on the Act by the learned judge makes its provisions to be wholly at variance with the convention it was passed to give effect to. Sect. 3 of the Act provides for the case in which a literary or artistic work is first produced in two countries simultaneously. This clearly shews that "produced" must mean "published" in the case of an artistic work, for a work cannot be "made" in two countries simultaneously. The general word "produced" is used in the Act for the sake of brevity, to avoid the necessity which might otherwise arise for using the words "published," "made," "performed," and "represented," as the case might

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require; but, when in order to carry out the terms of the convention it is necessary to read the word "produced" as meaning "published," it is contended that "the case requires" it to be so read. Publication in the case of a picture means publishing a reproduction of it.

Crackanthorpe, Q.C., and *Morton Smith*, for the defendants. The Act of 1886 would, no doubt, not have been passed but for the Berne Convention; but it must be construed with reference to its own language, and, though it was passed to carry out that convention, in so doing it may impose its own limitations or modifications. Sect. 11—the interpretation section—must be read reddendo singula singulis. In the case of an artistic work, such as a picture, the word "made" is applicable; in the case of a literary work, such as a book, or a dramatic or musical work, the words "published" or "performed" or "represented" are applicable. The law of different countries differs as to what constitutes "publication" of a work. The defendants were prepared to call evidence, if the case had been tried out, that in Italy exhibiting a picture is publishing it. The Act intended not to leave all these difficult questions at large, but to fix what in each case was the law to govern the matter as to different classes of works.

A second point is this. It is contended that registration in this country was necessary before the plaintiff could claim the benefit of the Act. There are conflicting decisions on this point. In *Fishburn* v. *Hollingshead* (1), Stirling J. held that, in order to entitle the owner of the English copyright in a foreign painting to sue in this country in respect of an infringement of such copyright, he must have previously registered himself as proprietor of the copyright under s. 4 of the Copyright Act, 1862. In *Hanfstaengl Art Publishing Co.* v. *Holloway* (2) Charles J. held the contrary. It is submitted that the decision of Stirling J. was right. The object for which registration of copyright was originally required was, that people might be able to ascertain whether there was existing copyright in a work which they desired to reproduce. The scope of the international copyright legislation is that the foreigner may be placed on

(1) [1891] 2 Ch. 371. (2) [1893] 2 Q. B. 1.

an equality with the native; but foreigners will be placed in a better position than Englishmen, if they are protected without registration in this country. The period of copyright is different in different countries. How is an Englishman to know whether by the law of a foreign country a work is the subject of copyright, unless it is registered in this country?

In the case of patents and trade-marks, registration is necessary in England, although it may not be required in foreign countries, and any suggested hardship on the owner of the copyright, by requiring him to register, exists equally in the case of patents or trade-marks.

[They cited *Tuck & Sons* v. *Priester* (1), and the International Copyright Act, 1844 (7 & 8 Vict. c. 12), ss. 1, 2, 3, 6, 8.]

Dickens, Q.C., was not called on to reply.

LORD ESHER M.R. If the decision of Stirling J. in *Fishburn* v. *Hollingshead* (2) is in conflict with that of Charles J. in *Hanfstaengl Art Publishing Co.* v. *Holloway* (3), I agree with the latter, and do not agree with the former. The case before us depends on the construction of the International Copyright Act, 1886, and what might have been the law if the earlier Acts were those under which we had to give a decision is immaterial. In construing the Act of 1886 we may require to look into the history of previous legislation. Looking at all the Acts, we can gather that for a long time foreign authors had a grievance and wished for relief. This was given at different times up to 1886, and all the International Copyright Acts were passed on the footing that in giving relief to foreign authors English authors should obtain reciprocal benefits in foreign countries. It is clear that authors in foreign countries and in this country were not satisfied with the Act of 1862; and the result of this dissatisfaction was a convention held at Berne to determine what more could be done. A draft convention was agreed upon; but it is obvious that, in itself, it would have no effect in this country, and that Courts of Law could not regard it. Parliament, therefore, undertook to give force to that which had been agreed

(1) 19 Q. B. D. 629. (2) [1891] 2 Ch. 371.
(3) [1893] 2 Q. B. 1.

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on at Berne. The point is taken that the Act of 1886 gave no sanction to the convention, which was not then in existence, but only to the draft, and we are asked to enter upon an inquiry whether the convention which was signed differed from the draft convention. This I decline to do. The preamble of the Act supplies the answer to such a suggestion, for it recited that the Act was passed to enable Her Majesty to accede to the convention. That necessitates our looking to see what the convention is. It was entered into for the protection of authors in respect of their literary and artistic works. "Authors" is a word applied not merely to the authors of books, but to the producers of artistic works. By the convention authors of any of the countries of the union are to enjoy, in the other countries, for their works, whether published in one of those countries or unpublished, the rights which the respective laws give to natives. That, however, is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work. The country of origin is, therefore, the thing to be considered, and it is defined as "that in which the work is first published." Thus the enjoyment of the rights which the respective laws granted to natives were to be subject to the accomplishment of the conditions and formalities prescribed by law in the country in which the work is first published. That is the convention, and the Act was passed so that Her Majesty might accede to it.

The manner in which Her Majesty was to accede to the convention was by an Order in Council, and s. 2 prescribes the extent and effect of such an order. Throughout the Act mention is made of "works produced," and of "works first produced" in foreign countries or the United Kingdom. The word "produced" is more general than the word "published" used in the convention, and there are works mentioned in the Act which would not be touched under the word "published," and the more general word is therefore used. Its meaning is defined by s. 11: "The expression 'produced' means, as the case requires, published or made, or performed or represented, and the expression 'production' is to be construed accordingly." It is not "as the subject-matter requires," but "as the case requires"—that is, as

the transaction which is being dealt with requires. That transaction is the adopting, so as to allow of its being carried into effect, of the Convention of Berne.

That being so, the word "produced" in the Act is to be construed so as to give effect to the convention—that is, it must be construed as meaning "published" when the country of origin is being determined. The question then is, in what country was the work of art first published, and not, as I understand the learned judge to have thought, in what country was it made. The word "made" is not used in the convention of Berne. I think that the correct application of the statute of 1886 and the Convention of Berne are to be found in the judgment of Charles J. in *Hanfstaengl Art Publishing Co.* v. *Holloway* (1), and that that learned judge was right in saying that the object of the legislation was not to impose disabilities, but rather, if they existed, to remove them. It seems to me most just in favour of the authors of all foreign countries that, if they have complied with the law of their own country, they shall be protected in this country, on condition that Englishmen who have complied with the laws of their own country shall be protected abroad. That is the construction of the Act that I adopt; and from that point of view the appeal must succeed, and there must be a new trial to determine any disputed question of fact that has been left open.

LOPES L.J. I am of the same opinion. There are two questions to be decided in this case. One is whether registration in England is a condition precedent to the right of the plaintiff to bring this action. In my opinion, it is not. It is to be observed that the Act received the Royal Assent in June, 1886, and the Order in Council was not made until November, 1887. But in the Order the Berne Convention is set out in the first schedule, and I think that is not an immaterial consideration having regard to what has been said with reference to the draft only being contemplated by the Act. I do not think it is necessary to consider the older International Copyright Acts. The intention of the convention was to create a new order of

(1) [1893] 2 Q. B. 1.

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things, and to remove and not to create disabilities. Sect. 4 of the Act of 1886 provides that the provisions of the International Copyright Acts with respect to the registry and delivery of copies of works shall not apply to works produced in a foreign country, except so far as provided by the Order. Such an order as is there contemplated is the Order in Council of November 28, 1887, which contains no provisions as to registration, and consequently the provisions of the previous Acts do not apply.

The second question is, What is the country of origin of this picture? On the one hand, it is said that Italy is the country of origin, because the picture was painted there; on the other hand, it is said to be Germany, because publication first took place there. The word used throughout the Act of Parliament with regard to foreign works is "produced," and it is argued that this does not mean, in the case of a work of art "published," but that it means "made." To determine this point it is necessary to look, not merely to the Act of 1886 and the Order in Council, but also to the convention. The Act itself shews this, for one of the recitals is that it is expedient to enable Her Majesty to accede to the convention. On referring to article 2 of the convention, I find that the rights which authors shall enjoy in other countries for their works is "subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work." The convention declares that the country of origin "is that in which the work is first published, or, if such publication takes places simultaneously in several countries of the union, that one of them in which the shortest term of protection is granted by law. For unpublished works the country to which the author belongs is considered the country of origin of the work." It is said that the word "produced," used in the Act of Parliament and in the Order in Council, in regard to such a work of art, means "made," and does not mean "published." On looking at s. 11 it appears that "the expression 'produced' means, as the case requires, published or made, or, performed or represented, and the expression 'production' is to be construed accordingly." I understand the expression "as the case requires" to mean "as provided by the Convention of Berne," and, in my opinion, the effect of looking

to the convention is that the word "published" in the interpretation clause of the statute is applicable to a painting. This decision does not determine the case between the parties, for it is said on one side that there was publication in Italy, and on the other that the publication was in Germany, and the case must go to a new trial to determine that question.

RIGBY L.J. There are two questions for our decision. In the Convention of Berne the word "produced" is not found, the word there used being "published." That word would not have covered all the case intended to be dealt with in the Act of 1886, and the wider word "produced" is there used—a word that has not got an exact legal meaning, but requires an interpretation to be put upon it in the statute in which it occurs. That is done by s. 11, by which "production" includes "publication" of everything that can be published. A painting is certainly capable, not only of being made, but of being published. An ingenious argument has been used as to the interpretation clause. It is said that it must be read reddendo singula singulis, and because some of the words used are not applicable to some of the things dealt with they are to be separated and applied separately so as to limit "published" to literary works, and "made" to artistic works. I do not so read the section. I consider that the word "produced" includes, in reference to a picture, the publication of that picture, and that the words of the Act were expressly made wide to cover all the cases dealt with in the convention.

With regard to the convention, it is true that the signature or verification did not take place till after the passing of the Act; but the object of the Act was to enable Her Majesty to agree to a convention, not necessarily in the exact words of the draft, but agreeing substantially with it. If the Act differed from the convention, and the words of the Act were quite plain, we might be bound to follow the Act; but the ordinary principles of interpretation compel us to take notice of the subject-matter to which the Act was intended to be applied—the Convention of Berne—and it appears to me that the suggestion of a difference between the two is unsubstantial and unarguable.

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Then comes the question of the necessity of registration in this country as a condition precedent to maintaining an action of this kind, and on the 4th section of the Act of 1886 this matter is reasonably plain. The International Copyright Acts there referred to are specified in the schedule, and among them are the Act of 1844 and s. 12 of the Act of 1862. The Act of 1862 was in the main a Copyright Act, and not an International Copyright Act, but this particular section is included in the latter class. That section says: "This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the 7th and 8th year of Her present Majesty" —that is, the Act of 1844—"in the same manner as if such provisions were part of this Act." Sect. 4 of the Act of 1886 deals with all the International Acts mentioned in the schedule, and it deals, therefore, with the provisions as to registration in the Act of 1844, as incorporated by s. 12 of the Act of 1862 into that Act. Sect. 4 of the Act of 1886 leaves to the absolute discretion of Her Majesty in Council whether any, and if so what part, of the International Copyright Acts, with reference to registration and delivery of copies, shall be incorporated into the Order in Council. The question is whether any provision as to registration in this country can possibly survive that section unless there be some provision to that effect in the Order in Council, and for my part I do not see how any can survive. But for the judgment of Stirling J., I should be content to rest my decision on this, that it is only by an Act applicable to international copyright that registration in this country could be enforced on foreigners, unless, indeed—a case which does not exist—the terms of our Municipal Copyright Acts apply to foreigners, with reference to foreign copyright, as well as to subjects of Her Majesty. But then I have to consider the judgment of Stirling J., and, unless I entirely misinterpret the reasoning, it is this. By s. 4 of the Act of 1862 there is a definite provision as to registration. That Act, by s. 12, incorporates the Act of 1844, and s. 4 of this latter Act says, in substance, that every provision of the Copyright Acts passed from time to time shall apply to the case of international copyright. The learned judge says that by virtue of that clause

in the Act of 1844 the similar section of the Act of 1862 is enforceable. He notices the distinction between Copyright Acts and International Copyright Acts, and says that it is by virtue of a provision in an International Copyright Act—s. 4 of the Act of 1844—that the section in the Copyright Act of 1862 is applicable. In my opinion that is so; but the learned judge does not give full effect to s. 4 of the Act of 1886, which deals with all International Copyright Acts, including in that category both the Act of 1844 and s. 12 of the Act of 1862. I think, therefore, no registration is necessary. The Order in Council might have imposed such terms, but it has not done so, and therefore no terms as to registration in this country exist.

Appeal allowed. Order for a new trial.

Solicitor for plaintiff: *C. U. Fisher.*
Solicitor for defendants: *Herbert Bentwitch.*

A. M.

[IN THE COURT OF APPEAL.]

MIDLAND RAILWAY COMPANY *v.* GUARDIANS OF THE POOR OF THE EDMONTON UNION.

Poor Law—Guardians—Limitation of Time for Payment of Debt—"Commencement of Proceedings before Competent Authority"—Application for Taxation of Costs—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict. c.* 49), *ss.* 1, 4—*Quarter Sessions—Costs—Taxation out of Sessions—Consent—Jurisdiction.*

By the Poor Law (Payment of Debts) Act, 1859, s. 1, any debt, claim, or demand incurred by or become due from the guardians of any union "shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards." By s. 4, "if any person claiming any debt or demand shall commence proceedings in any Court of Law or Equity, or before any justice or other competent authority, within the time hereinbefore limited, . . . and shall, with due diligence, prosecute such proceedings to judgment, or other final settlement of the question, such judgment shall be satisfied by the guardians against whom the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at, after the expiration of the period hereinbefore provided."

An appeal to quarter sessions against an assessment to the poor-rate of premises belonging to the appellants having been allowed with costs, the

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appellants, within the three months limited by s. 1, applied to the clerk of the peace to tax the costs :—

Held, by Lord Halsbury and A. L. Smith L.J. (Lindley L.J. dissenting), that this application was not a commencement of proceedings before a competent authority to enforce payment of the costs, and that, subsequent proceedings to enforce payment of the taxed amount having been commenced after the expiration of the three months, the guardians were not liable to pay the amount.

Decision of Charles J. reversed.

Per Lord Halsbury and A. L. Smith L.J. : When costs are allowed by an order of quarter sessions, and consent to a taxation out of sessions is not given, no subsequent court of quarter sessions has jurisdiction to order a taxation.

APPEAL by the guardians of the Edmonton Union against an order made by Charles J. on May 30, 1894, that a mandamus should issue to enforce the payment by the guardians of a sum of 206*l.* 17*s.* 7*d.*, due by them to the Midland Railway Company for costs, in accordance with an order of the general quarter sessions for Middlesex. The railway company had appealed to the quarter sessions against an assessment to the poor-rate of premises at Tottenham belonging to them, and their appeal was heard and allowed with costs on July 13, 1892. Consent to the taxation of the costs out of sessions was not given.

The solicitors to the appellants delivered their bill of costs on November 14, 1892, and an application was made to the clerk of the peace on December 5, 1892, to tax the costs. The objection was taken that there had been no consent to tax out of sessions, and on this ground the clerk of the peace, after consideration, refused on December 30 to tax the costs. The appellants applied to the quarter sessions on January 7, 1893, and they ordered that the costs should be taxed. The clerk of the peace accordingly, on January 26, certified the costs at the amount above mentioned. On February 23, 1893, an order dated July 13, 1892, for payment of the taxed amount, was drawn up. Nothing further was done until June 29, 1893, when the guardians, under Baines's Act (12 & 13 Vict. c. 45, s. 18), procured the removal of the order of quarter sessions to the Queen's Bench Division. An order nisi was, on August 7, 1893, granted to quash the order of quarter sessions ; and upon subsequent argument a Divisional Court (Wills and Wright JJ.), on November 27, 1893, upheld the order of quarter sessions. The Court were of opinion that

the ordinary practice was to tax out of sessions, and that there was an implied consent so to tax. The guardians objected to pay the costs, on the ground that by s. 1 of the Poor Law (Payment of Debts) Act, 1859, they were precluded from doing so.

The guardians applied to the Local Government Board for an extension of the time within which they might make the payment. On February 13, 1894, the Board refused the application. On March 2, 1894, the appellants commenced the present action for a mandamus. At the trial of the action Charles J. held that the mandamus ought to be issued. He was of opinion that s. 4 of the Poor Law (Payment of Debts) Act, 1859 (1) applied, and that the application for taxation which was made to the clerk of the peace on December 5, 1892, was a "commencement of a proceeding before a competent authority" within the meaning of s. 4; that it was made in time, having been made within three months from the end of the half-year which terminated on September 29, 1892; and that the proceedings had

(1) By s. 1: "With respect to any debt, claim, or demand which may after the passing of this Act be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account should or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board: Provided that the Poor Law Board by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand."

By s. 4: "If any person claiming any debt or demand shall have commenced, or shall hereafter commence, proceedings in any Court of Law or Equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment, or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at, after the expiration of the period hereinbefore provided, and all proceedings taken by mandamus or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section."

The Local Government Board has been substituted for the Poor Law Board.

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been prosecuted with "due diligence to judgment" within the meaning of s. 4. The guardians appealed.

A. Macmorran, and *R. Cunningham Glen*, for the guardians. Sect. 1 of the Act of 1859 is in the nature of a Statute of Limitations: *Baker* v. *Guardians of the Billericay Union* (1); *West Ham Union Guardians* v. *Bath Union Guardians*. (2) In the absence of consent there was no jurisdiction to order the costs to be taxed out of sessions.

Under s. 4 it was necessary that some proceeding to enforce payment of the costs should be commenced within three months after the expiration of the half-year in which the costs became due. If the order to pay the costs is taken to be of the date July 13, 1892, the three months ran from September 29, 1892, and no "proceeding" was commenced within that period. The application to the clerk of the peace to tax was not a "proceeding." He was not a "competent authority" within s. 4. The application to him was made only for the purpose of completing the order for payment by inserting in it an ascertained amount. Till that was done there was no debt the payment of which could be demanded: *Reg.* v. *Guardians of Stepney Union*. (3) If the order is to be taken as of the date February 23, 1893, the three months expired on June 24, 1893, and in that case also no "proceeding" was commenced within the three months. No proceeding was taken until June 29.

At any rate, the action for a mandamus is a new and independent proceeding, not the continuation of any prior proceeding, and it was clearly commenced too late.

Balfour Browne, Q.C., and *Ernest Page*, for the appellants. The application to the quarter sessions for an order to tax the costs was made at the earliest opportunity, and they held that there had been in effect a consent to a taxation out of sessions, and the Queen's Bench Division refused to quash their order. This decision was not appealed from, and it is now too late to appeal from it. It is, therefore, binding. The application to the clerk of the peace on December 5, 1892, was made to a

(1) 2 H. & C. 642. (2) 54 Justice of the Peace, 69.
(3) Law Rep. 9 Q. B. 383.

"competent authority" within s. 4. It was made to the only authority to whom it could be made, and it was a "commencement of a proceeding" within that section, and it was made in time. The taxation was a necessary step in enforcing payment of the costs. The company are not responsible for the delay of the clerk of the peace in performing what the quarter sessions held to be his duty.

[LORD HALSBURY. I am not satisfied that, in order to make out that the clerk of the peace was a competent authority, you are not bound to shew that consent to a taxation out of sessions was given: see *Bailey's Case.* (1)]

The decision of the Queen's Bench Division, affirming the order of quarter sessions, is conclusive that the clerk of the peace ought to have taxed the costs on December 5, 1892. The application to him on that day was a commencement of proceedings before a competent authority, and all the subsequent proceedings taken by the company have been a continuation of that original proceeding, and they have been prosecuted with due diligence. The delay has been caused by the action of the guardians.

A. Macmorran, in reply.

Cur. adv. vult.

Dec. 19. The following written judgments were delivered:—

LORD HALSBURY. Upon an appeal to quarter sessions on July 13, 1892, the defendants were ordered to pay the costs. No application was made for consent to tax out of sessions, and certainly no express consent was given. In the following December an application was made to the clerk of the peace to tax, and he refused to do so, on the ground that no consent to tax out of sessions had been given. If no consent had been given, this was right. The ascertaining of the costs is a judicial act to be done by the Court, and, unless consent is given, the clerk of the Court has no jurisdiction to entertain the question. When the sessions are being held he can, of course, under the supervision and direction of the magistrates, act as their officer, but it is as their officer only. Now, the necessity of

(1) 3 E. & B. 607.

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consent being conceded, my brother Wills thought that that consent could be inferred. I am unable to understand from what facts. None are stated, and, if you are to infer consent from the fact that it is customary to ask for consent and to obtain it when asked, that affords no ground for saying that you can infer it when it is not asked and not given. However, in the following January, 1893, the court of quarter sessions thought itself at liberty to order the taxation, and on the 26th of that month the costs were taxed at 206*l.* 17*s.* 7*d.*, and ordered to be paid. An attempt was made unsuccessfully to quash that order; and, if that question were now before us, I should say that the order ought to have been quashed. My brother Wills, as I have said, inferred consent. For the reasons I have given I think it would be a dangerous precedent to infer consent from such premisses as are alone to be found here, and the quarter sessions cannot give itself jurisdiction by finding a fact of which there is no legal evidence before it. My brother Wright, however, took a different ground. He said that the court of quarter sessions is a continuing court, and that, therefore, the Court in January had jurisdiction to award costs, and order them to be taxed as of the previous sessions in July. I am sure the learned judge's attention cannot have been called to s. 5 of 12 & 13 Vict. c. 45, which provides that "upon any appeal to any court of general or quarter sessions of the peace the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable." The legislature knew very well that, whatever may be the identity of the court as an abstraction, it occasionally consists of different persons, and they have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried. That ground, therefore, also fails. I confess I should myself feel some hesitation if the case were to turn upon whether we ought to give effect to an order made, as I think, without jurisdiction, though it is now unappealable, and though an ineffectual attempt to quash it has been made. But it is, I think, open to argument, when it is sought to make such an order the basis of further

proceedings, whether you may not inquire whether that basis is sound or not, although it is unappealable as an order. I have thought it right to refer to these points as they were urged in the argument before us, and, if unchallenged, might seriously affect the practice at sessions, which, so far as my experience is concerned, has been uniform for a long series of years.

But, in truth, the real question in this case turns upon the proper construction of the Poor Law (Payment of Debts) Act, 1859, which deals with boards of guardians. The legislature have seen fit to enact that boards of guardians shall pay any debt, claim, or demand which may be lawfully incurred or become due from them within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, and not afterwards. [His Lordship read ss. 1 and 4.] Now, this action began on March 2, 1894. If s. 1 is applicable, the action is out of date. It has been urged, however, that s. 4 of the statute preserves the continuity of the proceedings, so that the protection of that section can be invoked to make what I have described "a prosecuting with due diligence to judgment, or other final settlement of the debt, claim, or demand." I do not think the effort to tax was the commencing of proceedings. Assuming for this purpose that there was consent to tax out of sessions, it was an effort to complete proceedings begun in July. Furthermore, until a sum of money which was susceptible of payment was ascertained, there was no debt, claim, or demand become due or incurred by the guardians. The plaintiffs would not, therefore, be able to shew such proceedings as would even enable the guardians to pay without disobeying the Act of Parliament. The 1st section prohibits them, unless the 4th applies, and I think, upon these dates, the 4th section cannot apply. For these reasons, however reluctantly, I have come to the conclusion that the defendants are entitled to judgment. I say reluctantly, because there is no doubt a good and legitimate debt which they ought to have paid, and the payment of which, by one quibble or another, they have succeeded in postponing until the time has gone by within which, by law, it can be paid. The appeal, I think, must be allowed.

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LINDLEY L.J. This is an action of mandamus to enforce an order of quarter sessions, dated July 13, 1892, by which the defendants were ordered to pay the plaintiffs the costs of a poor law appeal. These costs have since been taxed at 206*l.* 17*s.* 7*d.* They were taxed on January 26, 1893. The writ in this action was not issued until March 2, 1894, and the defendants have a defence to it under the statute 22 & 23 Vict. c. 49, s. 1, unless the case can be brought within s. 4 of the same statute. [The Lord Justice read the sections, and continued:—] The poor law half-years expire on March 25 and September 29. In November, 1892, the plaintiffs sent in their bill of costs to the clerk of the peace to be taxed, and they obtained an appointment for December 5, 1892. The clerk of the peace, however, declined to tax the costs, on the ground that there was no agreement to tax out of sessions, and that he had therefore no jurisdiction to tax them. The plaintiffs thereupon, on January 7, 1893, applied to the next quarter sessions for an order to tax the costs, and the Court made an order accordingly, and on January 26, 1893, the costs were taxed in obedience to this order. The defendants still refused to pay, and, after some delay—viz., on June 29, 1893—the defendants removed the order into the High Court, and on August 7, 1893, they moved for and obtained an order nisi to quash it, on the ground that the court of quarter sessions had no jurisdiction to make it. Cause was shewn against the rule in November, 1893, and the rule was then discharged with costs. (1) From this order of the High Court there has been no appeal. The order of January 7, 1893, was made on the ground that, although there had been no express agreement to tax the costs out of sessions, there had been an implied agreement to that effect. The High Court apparently arrived at the same conclusion when it refused to quash the order of January 7, 1893. Be the reason good or bad, that order stands, and cannot be questioned now. The case, therefore, stands thus: The plaintiffs' right to be paid the costs in question accrued when the order to pay them was made—viz., on July 13, 1892. The plaintiffs took the proper proceedings to have them taxed in November, 1892, which was within the time mentioned in s. 4 of

(1) See 70 L. T. (N.S.) 355.

the statute. They were taxed after the expiration of that time—viz., on January 26, 1893—and no further proceedings were taken to enforce payment of them until more than twelve months afterwards—viz., March 2, 1894. This delay is to be accounted for by the conduct of the defendants, and by the proceedings taken by them to quash the order of January 7, 1893. It is to be observed that the statute on which this case turns is not like an ordinary Statute of Limitations: it does not say that no action shall be brought after a certain time. The statute is addressed to payments which the guardians have to make, and it limits a time for making them. The question, therefore, is, not whether this action is brought within a given time, but whether when it was commenced it was too late for the defendants lawfully to pay the costs in question. If it was, the Court ought not to order the defendants to pay those costs; but, if it was not, the Court ought to do so. Charles J. held that the plaintiffs' demand came within s. 1 of the statute on July 13, 1892, when the defendants were ordered to pay the plaintiffs their costs. He further held that the proceedings to tax, being commenced in sufficient time, brought the case within s. 4 of the Act, and he, therefore, gave judgment for the plaintiffs. I think he was right on both points. A construction of s. 1 which would confine it to demands for ascertained sums would enable persons having claims to keep them back until they were in danger of being barred by the ordinary Statute of Limitations. Such a construction would entirely defeat the object of the Act. A demand for an account, or for costs not yet ascertained by taxation, is therefore, I think, within s. 1 of the Act. If so, s. 1 applied to this case on July 13, 1892. But it is equally obvious that the plaintiffs could not compel the defendants to pay the costs until they were taxed. It was necessary for the plaintiffs to take proceedings to get them taxed. This they did in time, and the proceedings then taken were, I think, "proceedings commenced" within the meaning of s. 4. This construction is, I think, aided by s. 5, which relates to the payment of costs to solicitors employed by the guardians. I do not think the Act requires the costs to be taxed within the time limited by s. 1, if proceedings to obtain a taxation are commenced within that time. If I

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am right in this, the only other question is, whether, proceedings having been commenced in time, they have been prosecuted with due diligence. The defendants would not pay, and a mandamus was right and proper. No doubt this action might have been commenced earlier; but, having regard to the position taken up by the defendants, and their attempts to quash the order of January, 1893, I agree with Charles J. in thinking that there has been no undue delay on the part of the plaintiffs in prosecuting their demand. For these reasons I am of opinion that the case is brought within s. 1 of the Act, and is taken out of it by s. 4, and that, consequently, this appeal ought to be dismissed.

A. L. SMITH L.J. This is an action for a mandamus to compel the defendants to pay to the plaintiffs 206*l.* 17*s.* 7*d.*, the taxed costs of an appeal brought by the plaintiffs against them at the Middlesex Sessions, and which have been ordered by the quarter sessions to be paid by the defendants to the plaintiffs.

Many points were taken and argued upon this appeal on behalf of the guardians. The first which arises is that expressly raised by the statement of defence, viz., that the enactments of the 22 & 23 Vict. c. 49, ss. 1 and 4, which relate to the limit of time within which boards of guardians are to pay debts incurred by them, apply, and that consequently the plaintiffs' action is brought too late. Charles J. held that this defence was ill-founded.

Without entering upon the controversy which arose as to whether there had or had not been an agreement to tax these costs out of sessions, in my judgment it must be taken, after the order of sessions of January 7, 1893, for taxation and payment, confirmed by the order of the Queen's Bench Division, which stands unappealed against and is now unappealable, that the order upon the defendants to pay the taxed costs of the plaintiffs is a valid order and binding upon them, and that it is too late for the defendants to attempt to go behind the order and to seek in these proceedings to invalidate it. The order stands unimpeached, and effect must be given to it.

I entirely agree with Charles J. that, unless there was an agreement in Court to tax the costs out of Court, they must be taxed in Court, and no subsequent court of quarter sessions had

jurisdiction in the matter; and I equally disagree with the novel doctrine propounded by Wright J., when the case was before him and Wills J. in the Queen's Bench Division, that this was not so. (1)

The dates stand thus: On July 13, 1892, judgment at quarter sessions was given for the plaintiffs, and the defendants were ordered to pay the taxed costs of the plaintiffs; upon December 5, 1892, the plaintiffs carried in their bill of costs to be taxed; upon January 7, 1893, upon the refusal of the clerk of the peace to tax them, on the ground that there had been no agreement to tax out of court, the court of quarter sessions ordered them to be taxed and paid by the defendants; and upon January 26, 1893, they were accordingly taxed at the sum of 206*l.* 17*s.* 7*d.* Upon February 23, 1893, the guardians were served with an order of the quarter sessions, made as of July 13, 1892, to pay the costs, and the present action was not brought until March 2, 1894. [The Lord Justice read s. 1 of the Act 22 & 23 Vict. c. 49, and continued:—]

It is admitted that the half-years end upon March 25 and September 29 in each year, and that the three months would therefore expire upon June 24 and December 25 respectively.

I cannot doubt that, whether the order of July 13, 1892, or that of January 7, 1893, or the date of taxation, viz., January 26, 1893, be taken as the date upon which the 206*l.* 17*s.* 7*d.* was incurred or became due, these costs, at any rate after January 26, 1893, constituted a debt, claim, or demand within the meaning of s. 1, and that on March 2, 1894, it was, therefore, too late to bring an action to recover them, and that the defendants, under s. 1 of this Act, have an answer to this action. But it is said on behalf of the plaintiffs that, though this may be so, s. 4 of the Act has to be dealt with, and that, inasmuch as they carried in their bill of costs to be taxed upon December 5, 1892, they then commenced proceedings in time so as to obtain the benefit of s. 4, this being within the current half-year, plus three months, from the date of the order of July 13, 1892, which period expired on December 25, 1892. [The Lord Justice read s. 4.] The question is, What is the meaning of a person who claims

(1) See 70 L. T. (N.S.) 355.

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any debt or demand commencing proceedings within the time limited before any competent authority, and prosecuting the same with due diligence to judgment up to execution by mandamus or otherwise? Does it mean, as the plaintiffs contend, that the carrying in of a bill of costs to be taxed, in order to finish up the old proceedings long since commenced, and which were not proceedings in respect of any debt, claim, or demand against the guardians, though costs were therein incurred, is a commencement of proceedings within the meaning of the section? Or does it mean, as the defendants contend, the commencing of independent proceedings to recover what is due, and prosecuting them with due diligence to judgment and execution? I do not understand how it can be said that the application in a suit to have a bill of costs taxed is a commencing of proceedings at all. It is only the continuation of the old proceedings, a mere step therein to bring them to an end. I read ss. 1 and 4 thus: If proceedings are commenced within the three months after the current half-year, as prescribed by s. 1, to recover what is due from the guardians, and such proceedings are prosecuted with due diligence to judgment and execution by mandamus or otherwise, even though these proceedings thus commenced and prosecuted extend beyond the three months after the current half-year, the guardians are nevertheless to satisfy this judgment; but, if these proceedings are not commenced within the half-year or the three months, the guardians are not to do so. This section has no application, in my judgment, to a step taken in old proceedings long since commenced, and which were not brought to recover a debt due from the guardians; and here it is, I think, that my brother Charles has erred.

For these reasons I have (I admit with reluctance) come to the conclusion that the plaintiffs are unable to shew the commencement of any proceeding within the meaning of s. 4, so as to get out of the limit of time prescribed by s. 1; and, this being so, the defendants can rely upon s. 1. This appeal must be allowed, and judgment must be entered for the defendants.

Appeal allowed.

Solicitors: *Howard & Shelton; Beale & Co.*

W. L. C.

THE VESTRY OF ST. MARY, ISLINGTON, APPELLANTS *v.* COBBETT AND ANOTHER, RESPONDENTS. 1894 *Oct.* 29.

Metropolis—Management Acts—Streets — Paving Expenses — Lease held by Vestry—Trust for Enjoyment by the Public—"Owner"—Metropolitan Open Spaces Act, 1881 (44 & 45 *Vict. c.* 34), *ss.* 3, 5—18 & 19 *Vict. c.* 120, *s.* 250—53 & 54 *Vict. c.* 54.

An open space in a square, the roads in which were streets within the meaning of the Metropolis Management Acts, was acquired by a vestry, under the Metropolitan Open Spaces Act, 1881, by assignment of a lease, under which the vestry held in trust to allow the enjoyment by the public of the open space. The assignment contained a covenant by the vestry that the land should be held and used for the purposes of a public garden, pleasure ground, or open space, and, on failure so to use it, to reassign. The owners of houses in the square refused to pay the amount apportioned on them in respect of the expenses of flagging the footway of one of the roads, on the ground that the apportionment was bad, because the vestry had not been charged, as owners of the open space, with any proportion of the expenses:—

Held, that the vestry was the "owner" of the open space, within the meaning of the Metropolis Management Acts, and therefore the apportionment was bad.

CASE stated by justices.

The respondents were summoned under the Metropolis Management Act, 1862, Amendment Act, 1890 (1), as owners of houses in Barnsbury Square, for non-payment of 48*l.* 0*s.* 3*d.*, their proportion of the estimated expenses of providing and laying the flagging of the footways in the square.

The following facts were admitted or proved.

The footways of Barnsbury Square, the roads leading through which were streets within the meaning of the Metropolis Management Act, 1855, and other Acts amending the same, were laid out at the passing of the Act of 1855, and had been since repaired by the appellants, but had not been flagged, or had been only partially flagged.

The respondents were the owners, within the meaning of the Acts, of the houses mentioned in the complaint, which houses bounded or abutted upon, and formed part of, one of the streets.

(1) 53 & 54 Vict. c. 54. Sect. 1 empowers vestries to flag footpaths and recover the expense from the owners of adjoining houses or land, and s. 2 provides for the apportionment and recovery of such expense.

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The estimated expenses of flagging the footway of this street had been duly determined by the appellants, and apportioned among the owners of the houses and land bounding and abutting on the square, omitting any apportionment in respect of the owners (if any) of the garden in the square, the amount apportioned in respect of the abuttal of the respondents' houses being 48*l.* 0*s.* 3*d.*, which amount had been duly demanded from the respondents, but had not been paid.

In the centre of the square or garden, enclosed by iron railings, was an open space, which previously to May 2, 1891, was used in common, as an ornamental or pleasure ground, by the occupiers of the houses bounding or abutting on the square. Upon May 2, 1891, the appellants, acting under s. 5 of the Metropolitan Open Spaces Act, 1881 (1), acquired the residue of a term of twenty-six years, commencing from December 25, 1882, from the Earl of Meath, to whom a lease of the land had been assigned to hold on behalf of the Metropolitan Public Gardens Association (2), and the appellants had since May 2, 1891, held the residue of the term, and administered control over the open space or garden under the Act, in trust to allow, and with a view to, the enjoyment by the public of the open space.

The respondents contended that the apportionment was bad in law, inasmuch as the appellants, or other the owners, had not thereby been charged with any proportion of the estimated cost of flagging the footways, in respect of the open space or garden,

(1) 44 & 45 Vict. c. 34. Sect. 3 empowers the owner of any open space within the metropolis, which is subject to rights of user for exercise and recreation in the owners or occupiers of houses, with the consent of such owners and occupiers, to convey to the vestry the soil of such open space in trust for the enjoyment of the public, and also empowers the owner of any term of years or other limited interest in such open space to transfer in the same way such term of years or limited interest. Sect. 5 empowers the vestry to take and hold the soil and freehold of, or any term of years or limited interest in, such open space, and to undertake the care, management and control of the open space.

(2) The lease and two subsequent assignments were part of the case. The assignment to the vestry was subject to the covenants in the lease, and contained a covenant by the vestry that the land should be held and used for the purposes of a public garden, pleasure ground, or open space, and on failure so to use it to reassign.

as required by the decision in *Vestry of Paddington* v. *North Metropolitan Railway and Canal Co.* (1)

The appellants contended that they held the open space or garden in trust for the enjoyment of the public, and therefore had no beneficial interest therein, and were not the owners thereof, within the meaning of the Metropolis Management Act, 1855 (2), and were therefore not liable to contribute towards the payment of the estimated expenses, and that there was no owner of the open space or garden, within the meaning of the Act.

The justices were of opinion that there were owners of the open space or garden, within the meaning of the Acts, who were liable to contribute towards the payment of the estimated expenses, and should therefore have been included in the apportionment, and that consequently the apportionment was bad in law, and they dismissed the summons.

R. Cunningham Glen, (*Dickens, Q.C.*, with him), for the appellants. The respondents ought to have been held liable, for their contention that the vestry was liable to contribute as being the "owner" is untenable: *Angell* v. *Vestry of Paddington*. (3) By the terms of the Metropolitan Open Spaces Act, 1881, referred to in the case, and by the terms of the assignment to them, the vestry hold only for a particular purpose, and could not under any circumstances let at a rack-rent, and therefore cannot be the "owner," within the meaning of the Metropolis Management Acts: *Great Eastern Ry. Co.* v. *Hackney Board of Works*. (4) The fact that the land is taken under the Metropolitan Open Spaces Act distinguishes this case from *Bowditch* v. *Wakefield Local Board of Health* (5), *Wright* v. *Ingle* (6) (in which some of the observations of Bowen L.J. support the appellants' contention), and *Vestry of Paddington* v. *North Metropolitan Railway and*

(1) [1894] 1 Q. B. 633.

(2) 18 & 19 Vict. c. 120. By s. 250: "The word 'owner' shall . . . . mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By s. 5 of the Act of 1890 the Act of 1855 and that Act shall be construed together as one Act.

(3) Law Rep. 3 Q. B. 714.

(4) 8 App. Cas. 687.

(5) Law Rep. 6 Q. B. 567.

(6) 16 Q. B. D. 379.

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Canal Co. (1) In *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (2) the company made a profit.

[He also referred to *Plumstead Board of Works* v. *British Land Co.* (3)]

R. G. Glenn, for the respondents. The view adopted by the magistrates is supported by numerous authorities: *Bowditch* v. *Wakefield Local Board of Health* (4); *Caiger* v. *Vestry of St. Mary, Islington* (5); *Vestry of Paddington* v. *North Metropolitan Railway and Canal Co.* (1); *In re Christchurch Inclosure Act, Meyrick* v. *Attorney-General.* (6) The case of *Angell* v. *Vestry of Paddington* (7) is distinguishable, because there the church was dedicated for all purposes.

[He also referred to *Robson* v. *Hyde* (8); *London School Board* v. *St. Mary, Islington* (9); *Williams* v. *Wandsworth Board of Works.* (10)]

R. Cunningham Glen, replied.

MATHEW J. I am of opinion that the respondents are entitled to our judgment, and that the decision of the magistrates is right. The appellants, the Vestry of St. Mary, Islington, are owners of the land bounding or abutting on the road or street in which the footway in question is situate, within the meaning of the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54), s. 1. It is contended, however, that any obligation to contribute to the expense of flagging the footway, which would otherwise be imposed by that section, is taken away by the Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), s. 3. That section empowers the owner of any open space within the metropolis, which is subject to rights of user for exercise and recreation in the owners or occupiers of any houses round or near the same, with the consent of such owners and occupiers, to convey to the vestry the soil of the open space in trust for the enjoyment of the public; the section continues, "and the owner, or any person or persons in whom any term of

(1) [1894] 1 Q. B. 633.
(2) [1894] 1 Q. B. 699.
(3) Law Rep. 10 Q. B. 203.
(4) Law Rep. 6 Q. B. 567.
(5) 50 L. J. (M.C.) 59.
(6) [1894] 3 Ch. 209.
(7) Law Rep. 3 Q. B. 714.
(8) Caldecott, 310.
(9) 1 Q. B. D. 65.
(10) 13 Q. B. D. 211.

years or other limited interest in such open space is vested, may, with the like consent, grant or transfer to . . . such vestry . . . in trust as aforesaid, any term of years or other limited interest in . . . such open space." The Act contemplates a limit in point of value and a restricted interest in point of time. The land in question here was formerly used as an ornamental or pleasure ground by the householders in the square, but was afterwards acquired under the Metropolitan Open Spaces Act, 1881, by the appellants, to whom was assigned the residue of a term of years under a lease which had been assigned to Lord Meath to hold on behalf of the Metropolitan Public Gardens Association. The assignment to the appellants was subject to a restrictive covenant, which bound them to hold and use the land for a public garden, pleasure ground, or open space, and, in case of failure to do so, to reassign. The Earl of Meath would be the owner but for the assignment from him to the appellants, for if the land had been let at a rack-rent before he assigned it he would have been entitled to receive the rack-rent. It is plain that, unless there is something in the Act to the contrary, a public body, such as the appellants, acquiring under a statute a right to the land by assignment of a lease, would be in the same position as the Earl of Meath while he held under the lease. The land is held subject to the covenants in the lease, and the assignment to the appellants contains a covenant that the land shall be held and used for a particular purpose, and, in case of failure so to use it, shall be reassigned; it is impossible to say that land so held has been placed extra commercium, as has been contended. It is land which might be let at a rack-rent. *Bowditch* v. *Wakefield Local Board of Health* (1) is a clear authority in support of this view. That was the case of a school, and a trustee of the school, who received no rent, was nevertheless held to be the "owner," because he was the person who would have received the rack-rent if the school had been let at a rack-rent. The appellants relied on the case of *Angell* v. *Vestry of Paddington* (2) as shewing that they could not be liable as owners; but that was the case of a church, which the Court of Queen's Bench held could not be assessed under the Metropolis Management Acts, either as a

(1) Law Rep. 6 Q. B. 567. (2) Law Rep. 3 Q. B. 714.

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house or as land. There the church was dedicated for all purposes to certain uses, and the hypothesis of ownership was not admissible. Therefore the decision is not in point in the present case. It is not necessary to refer to the other cases. I am of opinion that the decision of the magistrates was right.

CHARLES J. I am of the same opinion. An attempt is made to shew that this land is extra commercium, according to the decision in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1) and that the vestry is not the "owner" within the meaning of the Act, because by the terms of the assignment to them they could not let it at a rack-rent. The observations of Bowen L.J. in *Wright* v. *Ingle* (2) were applied to the case of a permanent dedication to a particular purpose. On this short ground, I am of opinion that the cases relied on for the appellants have no application, and the respondents are entitled to judgment.

Judgment for the respondents.

Solicitor for appellants: *William Lewis.*
Solicitors for respondents: *Jordan & Davies.*

(1) 8 App. Cas. 687. (2) 16 Q. B. D. 379.

P. B. H.

SCOBIE *v.* COLLINS.

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Nov. 16, 19.

Mortgage—Attornment Clause—Death of Mortgagor—Occupation and Payment of Interest by Heir-at-Law—Bankruptcy of Heir-at-Law—Distress by Mortgagees under Attornment Clause.

A mortgage contained the usual attornment clause, and the mortgagor, who was in occupation of the mortgaged property, attorned tenant to the mortgagees, and during his life paid the interest on the mortgage. The mortgagor died intestate, and his heir-at-law entered into possession of the mortgaged property, and for a time paid the interest under the mortgage, but subsequently became bankrupt. The mortgagees having distrained for arrears of interest, on the ground that they were entitled to do so as landlords under the attornment clause:—

Held, that as the original tenancy was determined by the death of the mortgagor, and a new tenancy was not created between the mortgagees and the heir-at-law by mere payment of interest, the distress was illegal, and that the trustee in bankruptcy was entitled to the proceeds of the distress.

West v. *Fritche* (3 Ex. 216) distinguished.

THE plaintiff was the trustee of the property of T. P. Pymble, a bankrupt, and contended that a distress levied by the defendants on the property of the bankrupt was illegal, and that he was entitled to the proceeds of the same, under the following circumstances:—

By deed dated March 26, 1861, and made between T. Pymble of the one part, and A. Hancocks of the other part, T. Pymble conveyed certain freehold hereditaments to A. Hancocks by way of mortgage to secure the repayment of 10,000*l.*, then advanced to him, with interest thereon at 5 per cent. per annum. T. Pymble was in occupation of the mortgaged premises, and the mortgage deed contained the following attornment clause: "And the said T. Pymble doth hereby attorn and agree to become tenant to the said A. Hancocks of the said hereditaments and premises hereby conveyed at the yearly rent of 500*l.*, to be paid and payable by two equal half-yearly payments on the 26th of September and the 26th day of March in every year whilst he shall be permitted to remain tenant of such hereditaments and premises. And the said T. Pymble hath this day paid into the hands of the said A. Hancocks the sum of 1*s.* upon such attornment and on account

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of the accruing rent." In 1863 A. Hancocks assigned the mortgage to the defendants as the trustees of his marriage settlement.

T. Pymble regularly paid the interest on the mortgage during his life. He died in 1888 intestate, leaving an only son, T. P. Pymble, who took possession of his father's household effects, farming-stock, and assets, without taking out administration to his deceased father's estate; and, as heir-at-law, entered into possession of the mortgaged estate, and farmed it for his own benefit, and for some time kept down the interest on the mortgage debt, the receipts being made out to him as for interest and not for rent.

In October, 1893, the defendants levied a distress on the mortgaged premises to recover a half-year's interest which was in arrear, claiming to do so as landlords under the attornment clause.

In November, 1893, T. P. Pymble was adjudicated bankrupt; and on December 6, 1893, the plaintiff was appointed the trustee in his bankruptcy.

Bosanquet, Q.C., and *Gatey*, for the plaintiff. The plaintiff is entitled to the proceeds of the distress. The attornment clause only created a tenancy at will between the original mortgagor and mortgagee. It was a personal relationship which was determined by the death of the original mortgagor: *Turner* v. *Barnes.* (1) The fact that the bankrupt took possession of the mortgaged estate on his father's death and paid the interest on the mortgage did not create a tenancy at will between him and the defendants: *Doe d. Stanway* v. *Rock* (2); and there is no evidence that a new tenancy was created between them.

A. T. Lawrence, and *W. C. Prance*, for the defendants. The tenancy created by the attornment clause was a yearly tenancy, which on the mortgagor's death vested in the bankrupt as administrator de son tort of his father: *In re Threlfall* (3); *In re Knight.* (4) It is submitted that the payments of interest by the bankrupt were equivalent to payments of rent, and the pre-

(1) 2 B. & S. 435.
(2) 4 M. & G. 30.
(3) 16 Ch. D. 274.
(4) 21 Ch. D. 442.

sumption is that a new tenancy was created between him and the defendants.

Bosanquet, in reply.

VAUGHAN WILLIAMS J. This is an action of trespass, and the question raised is whether the defendants had a right to distrain as they did.

The defendants by the terms of their defence rely upon an attornment clause contained in an indenture of mortgage dated March 26, 1861, and the relation of landlord and tenant arising thereunder. The defendants cannot, strictly speaking, rely on this attornment and consequent tenancy, because the original mortgagor who attorned is dead, and the tenancy at will founded upon the attornment clause came to an end with his death: *Turner* v. *Barnes*. (1) Had the tenancy continued, the attornment clause, so far as it gave a right of distress, would have been void as a bill of sale on the authority of *Mumford* v. *Collier*. (2) The defence must be based on a new tenancy arising on the occupation of the mortgagor's son, and I think I ought to treat the defence as amended so as to raise the defence founded on this tenancy. This being done, the question is whether there is evidence here of a new tenancy at will under which the bankrupt became tenant of the mortgagees. There is no doubt but that the occupation by the bankrupt was an occupation connected with the mortgage, because that which the bankrupt paid is called in the receipts "interest." But am I entitled to hold that the interest so paid by a person who never attorned tenant was paid quâ rent? In *West* v. *Fritche* (3) the interest was not paid as rent, and yet the Court held there was a tenancy; but the decision was based entirely on occupation by one who had executed a deed containing an attornment clause. Here the suggested tenancy is by one who has not executed any attornment clause, and who has merely occupied and paid interest. A mortgagor in possession is not necessarily more than a tenant on sufferance, and occupation and payment of interest necessarily connected with the mortgage is not necessarily referable to a

(1) 2 B. & S. 465. (2) 25 Q. B. D. 279.

(3) 3 Ex. 216.

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tenancy other than a tenancy on sufferance. I think that it is tolerably clear that the occupation by the bankrupt was to his knowledge an occupation subject to the right of the mortgagees; but I am afraid I cannot find that he ever attorned tenant or that the evidence shews he knew he was tenant. It is unfortunate for the mortgagees that the receipts were not given as for rent. My judgment must be for the plaintiff for the amount realized by the sale.

Solicitor for plaintiff: *A. Hunt, for H. Easton, Leominster.*

Solicitor for defendants: *S. Gissing Skelton, for F. H. Adams, Upton Bishop, near Ross.*

H. L. F.

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Dec. 13, 20.

[IN THE COURT OF APPEAL.]

SIDEBOTHAM *v.* HOLLAND.

Landlord and Tenant—Yearly Tenancy—Notice to Quit—Commencement of Tenancy—"On" or "From" the Day specified—Agreement not to be performed within a Year—Statute of Frauds, s. 4.

By an agreement in writing the plaintiff agreed to let a house to the defendant as yearly tenant "commencing on the 19th of May, 1890," an apportioned part of the rent up to June 24 next to be paid at once, and the future rent to be paid quarterly in advance on the usual quarter-days. On November 17, 1893, the plaintiff gave the defendant notice to quit on May 19 following; and subsequently brought an action to recover possession of the premises. The defendant disputed the validity of the notice to quit, and also set up an oral agreement made in December, 1892, that the tenancy of the house should not be terminated till November, 1895. The plaintiff in reply pleaded the 4th section of the Statute of Frauds:—

Held, that the tenancy must be taken to have commenced on May 19, and not on June 24; that the day mentioned in a demise as the commencement of the tenancy is the first day of the term, whether the expression used be "on" the day specified or "from" that day; and consequently that a notice to quit on May 18 would have been good.

But *held* (A. L. Smith L.J. doubting), that the notice to quit on May 19 was also good, that being the anniversary of the commencement of the term:—

Held, also, that the oral agreement to continue the tenancy beyond a year was invalid under the Statute of Frauds, there being no fresh demise.

APPEAL from a judgment of Bruce J. in favour of the defendant in an action to recover possession of a house and premises.

By an agreement in writing made on May 19, 1890, between the plaintiff T. Sidebotham, therein called the landlord, and the defendant Ellen Holland, therein called the tenant, the landlord agreed to let and the tenant agreed to take a certain messuage called the Grapes Inn, at Salford, as yearly tenant, commencing on May 19 instant, at the clear yearly rent of 45*l.*, the sum of 4*l.* 7*s.* 6*d.*, as the apportioned part up to June 24 next, being paid on the signing of the agreement, and the future rent to be paid by equal quarterly payments in advance, if demanded, on the usual quarterly days of payment; the first payment to be considered as due in advance if demanded on June 24 next, and each succeeding quarterly payment to become payable in advance if required upon the first day of such quarter.

On November 17, 1893, the solicitor for the landlord sent the following notice to quit to the tenant, which was received by her on the same day:—

"As solicitor for and on behalf of Mr. Thomas Sidebotham, your landlord, I hereby give you notice to quit and deliver up the peaceable and quiet possession to him on the 19th May next of the Grapes Inn and premises in your occupation, situate, &c., and which you now hold of him as tenant under agreement dated the 19th of May, 1890."

The plaintiff brought the present action on May 22, 1894, for the recovery of the premises.

In her defence the defendant denied that she had received a proper notice to quit, and further alleged that in 1891 and 1892 she lent the plaintiff sums amounting to 100*l.*, and that in consideration of these loans the plaintiff orally agreed in December, 1892, that the tenancy of the house should not terminate till November 9, 1895, on which day the plaintiff's interest in the premises terminated; and she counter-claimed for the sum then due to her on the loans. The plaintiff in reply pleaded the 4th section of the Statute of Frauds, and paid 85*l.* into Court as the amount then due from him on the loans.

The action was tried before Bruce J., without a jury. The learned judge held that the agreement not to terminate the tenancy till November 9, 1895, was void under the Statute of

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Frauds, but that the notice to quit was invalid, and gave judgment in the action for the defendant.

The plaintiff appealed from this judgment; and the defendant gave cross-notice of appeal from so much of the judgment as decided that the agreement not to terminate the tenancy till November 9, 1895, was void under the Statute of Frauds.

McCall, Q.C., and *Roskill*, for the plaintiff. The notice to quit was a good notice. The tenancy began on May 19, 1890. If nothing had been said in the agreement as to the commencement of the tenancy it might have been held to begin on June 24; but the direct statement that it was to begin on May 19 prevents such an inference being drawn: *Kemp* v. *Derrett* (1); *Doe* d. *Savage* v. *Stapleton*. (2) The apportionment of the rent of the broken quarter does not lead to that inference; and the Apportionment Act would prevent the tenant paying more than her proper proportion of the rent of the last quarter: *Hartcup* v. *Bell*. (3) If the tenancy began on May 19, the notice to quit was good for that day. It makes no difference whether the term was to begin "on" May 19 or "from" that day; for whether May 19 or 20 was the first day of the term the notice is equally good. It is sufficient that the notice should be given for the anniversary of the first day of the term. There has been a full half-year of 182 days between the giving of the notice and its expiration, and that is sufficient: *Clayton* v. *Blakey* (4); *Morgan* v. *Davies* (5); *Poole* v. *Warren*. (6)

With respect to the cross-notice of appeal, the alleged agreement was not in writing, and therefore void under the 4th section of the Statute of Frauds, as it was not to be performed within a year. No new tenancy was thereby created, for no fresh possession was given to the tenant: *Doe* d. *Cornwall* v. *Matthews* (7); *Cutting* v. *Derby* (8); *Marshall* v. *Berridge* (9); *Wood* v. *Beard*. (10)

J. W. Mansfield, and *E. F. Spence*, (*Shee, Q.C.*, with them),

(1) 3 Camp. 510.
(2) 3 C. & P. 275.
(3) C. & E. 19.
(4) 8 T. R. 3; 2 Sm. L. C. 9th ed. 118.
(5) 3 C. P. D. 260.
(6) 8 A. & E. 582.
(7) 11 C. B. 675.
(8) 2 W. Bl. 1075.
(9) 19 Ch. D. 233.
(10) 2 Ex. D. 30.

for the defendant. When the rent is payable on the usual quarter-days, whenever the tenancy actually begins, the term is reckoned from the first quarter-day, and the notice to quit must be given for a quarter-day: *Doe* d. *King* v. *Grafton* (1); *Doe* d. *Holcomb* v. *Johnson.* (2) But supposing that the term began on May 19, that day was the first day of the term, for the expression is "on" May 19, not "from" that day: *Doe* d. *Spicer* v. *Lea* (3); Woodfall's Landlord and Tenant, 14th ed. p. 372. Therefore the notice to quit ought to have been given for May 18. If the tenant is allowed to remain till the 19th, he will have begun a new year, and a fresh notice will be requisite.

[LORD HALSBURY referred to *Reg.* v. *Humphery.* (4)]

It may be different where the tenancy begins on one of the usual quarter-days, in which case a notice expiring on a quarter-day may be sufficient; but that is a matter of custom. Where the tenancy begins in the middle of a quarter, as here, the tenant is entitled to 183 clear days, which the defendant did not have here: *Pugh* v. *Duke of Leeds* (5); *Page* v. *More* (6); *Ackland* v. *Lutley* (7); *Lester* v. *Garland* (8); *Clayton* v. *Blakey* (9); *Quartermaine* v. *Selby* (10); *Right* v. *Darby* (11); *Anon.* (12)

With respect to the parol agreement, the plaintiff has received the consideration for it, and he cannot now repudiate it. A plaintiff cannot set up the Statute of Frauds in his reply: *Mills* v. *New Zealand Alford Estate Co.* (13); *James* v. *Smith.* (14) But the agreement really operated as a fresh demise: a fresh tenancy was created until November 9, 1895, which was less than three years from the date of the agreement, and therefore need not be in writing: *Doe* d. *Phillip* v. *Benjamin.* (15)

[LINDLEY L.J. referred to *Doe* d. *Buddle* v. *Lines.* (16)]

McCall, in reply.

Cur. adv. vult.

(1) 18 Q. B. 496.
(2) 6 Esp. 10.
(3) 11 East, 312.
(4) 10 A. & E. 335.
(5) Cowp. 714.
(6) 15 Q. B. 684.
(7) 9 A. & E. 879.
(8) 15 Ves. 248.
(9) 8 T. R. 3.
(10) 5 Times L. R. 223.
(11) 1 T. R. 159.
(12) Dyer, 345 a.
(13) 32 Ch. D. 266, 279.
(14) [1891] 1 Ch. 384.
(15) 9 A. & E. 644.
(16) 11 Q. B. 402.

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1894. Dec. 20. LINDLEY L.J. delivered the following written judgment, in which he said Lord Halsbury concurred, as follows:—

The express statement in this agreement that the tenancy is to commence on May 19 is too clear and unambiguous to warrant any inference which might otherwise have been drawn from the stipulation that the rent is to be paid by equal quarterly payments, in advance if demanded, on the usual quarter-days. In the absence of any express statement as to the commencement of the tenancy it might have been held to commence on June 24. See *Doe* d. *Holcomb* v. *Johnson* (1); *Sandill* v. *Franklin*. (2) It is true that, if the tenancy commences on May 19, the last quarterly payment to be made in advance on the previous Lady Day will not be a full quarter's rent, but only a proportionate part of it—viz., an apportioned part for the time which will intervene between Lady Day and May 19. But this circumstance only shews that the agreement is not very accurately drawn. The inaccuracy does not justify the conclusion that the tenancy did not commence on the day expressly mentioned for its commencement—viz., on May 19, 1890; and that the time which intervened between that day and June 24 was not part of the tenancy. Treating the tenancy then as commencing on May 19, 1890, the question is whether a notice to quit on May 19, 1894, given by the landlord on November 17, 1893, is a good notice. It is a six calendar months' notice to quit on the anniversary of the day on which the tenancy commenced. Why, then, is it bad? The notice is said to be bad because it expires one day too late. The contention is that, as the tenancy commenced "on" the 19th and not "from" the 19th, the notice should have been to quit on the 18th and not on the 19th. Having regard to the decision in *Clayton's Case* (3), I think that, although the agreement was signed on the 19th, and the tenant can hardly in fact have been in possession the whole of that day, yet, in point of law, that day must be treated as the first day of the tenancy and as part of the term for which the house was agreed to be let. The tenancy cannot, therefore, be treated as commencing on the 20th to the exclusion

(1) 6 Esp. 10.

(2) Law Rep. 10 C. P. 377.

(3) 5 Rep. 1.

of the 19th. One year from that day, but including that day, would expire at midnight of the 18th of the next May: *Reg.* v. *St. Mary, Warwick* (1); *Ackland* v. *Lutley.* (2) If, therefore, notice to quit on the 18th were given, it would no doubt be good. Indeed, it is well settled that a notice ought to expire on the last day of the current year: see *Right* v. *Darby* (3); *Doe* v. *Dobell.* (4) But, although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not. I have looked at all the decisions which were referred to in the argument and at many more, and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case. The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place. There are several decisions in which notices like the present have been held sufficient. In *Kemp* v. *Derrett* (5) a yearly tenancy began on October 29; it was determinable at any time on a three months' notice to quit. Lord Ellenborough said, "I am quite clear that the notice should have expired on January 29, April 29, July 29, or October 29." Again, in *Doe* v. *Matthews* (6), a yearly tenancy commenced on May 7, 1850; a six months' notice to quit on May 7, 1851, was held good. The rent was payable quarterly, but none was ever paid. *Roe* d. *Durant* v. *Doe* (7) and *Papillon* v. *Brunton* (8) are again cases in which the tenancy began on (or perhaps from) a usual quarter-day; the notice was to quit on the anniversary of that day, and the notice was held good. In those cases a notice to quit on the day before the anniversary would be bad: see *Page* v. *More.* (9) In *Right*

(1) 1 E. & B. 816.
(2) 9 A. & E. 879.
(3) 1 T. R. 159.
(4) 1 Q. B. 806; 1 Wm. Saund. 276 c.
(5) 3 Camp. 510.
(6) 11 C. B. 675.
(7) 6 Bing. 574.
(8) 5 H. & N. 518.
(9) 15 Q. B. 684.

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v. *Darby* (1) and *Morgan* v. *Davies* (2) the notices were too short and were bad on that ground; but no one suggested that they were bad because they were notices to quit on the anniversary of the day on which the tenancy commenced. In *Page* v. *More* (3) a notice to quit on the right day was bad; but it was given by the landlord and it was to quit at noon, which was too soon. In the last edition of Jarman's Bythewood, vol. 3, p. 276, the rule is thus laid down: "It—i.e., the notice to quit—must generally be a half-year's notice, and must expire at the period of the year at which the tenancy commenced; and it is immaterial whether the letting was from one of the general quarter-days or from any other day." For these propositions several authorities are cited, the more important of which I have noticed. When considering the validity of a notice to quit given in time and expiring on the anniversary of the commencement of a tenancy, I can find no distinction ever drawn between tenancies commencing "at" a particular time or "on" a particular day and "from" the same day. "At," "on," "from" and "on and from" are for this purpose equivalent expressions. Any distinction between them for such a purpose as this is far too subtle for practical use: see *Doe* d. *Strickland* v. *Spence*. (4) In an action for double rent it is, however, necessary to be more particular: *Page* v. *More*. (3) So it is when the number of days has to be counted. In the absence of authority compelling me to decide differently, I hold the objection that the notice was bad because it was a notice to quit on the 19th instead of the 18th of May untenable.

Then it was said that where the tenancy is not from one of the usual quarter-days there must be at least 183 days between the day on which the notice is given and the day on which it expires. There were, however, 183 days in this case if the time is reckoned in the usual way—that is, counting in one of the extremes and excluding the other, and I can find no case which decides that both extremes must be excluded. In 1 Wms. Saunders, 276c, it is said that a half-year's notice must consist of 182 days, except when the rent is payable on the usual quarter feast days, when notice on one feast day to quit on the

(1) 1 T. R. 159.
(2) 3 C. P. D. 260.
(3) 15 Q. B. 684.
(4) 6 East, 120.

next but one is sufficient. If 182 days' notice are enough, it is plain that this notice was long enough.

Lastly, it was urged that the notice was bad because the lessor had promised for valuable consideration not to turn the tenant out before November, 1895. This is the defendant's real defence to this action. Unfortunately, however, the promise was a verbal one; it was not to be performed within a year, and the Statute of Frauds precludes the defendant from enforcing it. Under these circumstances it is impossible to hold the notice bad on this ground. An argument was advanced that this verbal agreement created a new lease until November, 1895, and that the term created by the written agreement of 1890 was impliedly surrendered. But it is familiar law that whether an agreement operates as a demise or as an agreement only depends on the intention of the parties. Now, in this case it is plain that no new lease was ever thought of or intended by either party, and it would not be right to invent one in order to get the defendant out of the difficulty in which the absence of a written agreement places her. In my opinion, therefore, the appeal ought to be allowed, and judgment be entered for the plaintiff, with costs here and below.

A. L. SMITH L.J. delivered the following written judgment:—

This is an action of ejectment brought by a landlord against his tenant, wherein Bruce J. has given judgment for the tenant and the landlord appeals.

By agreement executed upon May 19, 1890, the plaintiff let to the defendant a public-house as yearly tenant commencing "on" May 19, 1890, at the clear yearly rental of 45*l.*, and it was thereby agreed that the sum of 4*l.* 7*s.* 6*d.*, as the apportioned part up to June 24 then next, should be paid on the signing of the agreement, and the future rent should be paid by equal quarterly payments in advance if demanded on the usual quarter-days of payment. On November 17, 1893, the landlord gave the defendant a six months' notice to quit upon May 19, 1894, and, upon the tenant refusing to go out, the present action was brought, which the defendant resisted upon the grounds: First, that in consideration of her advancing 100*l.* to the plaintiff, he

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promised in the month of December, 1892, that, although she was but a yearly tenant, she should remain in possession until 1895; secondly, that by the agreement the tenancy commenced upon June 24, and that the six months' notice served upon November 17, 1893, to quit upon May 19, 1894, was more than a month prior to June 24 and therefore bad; and, lastly, said the learned counsel for the defendant, who argued their case admirably, if the tenancy commenced on May 19, as the plaintiff alleged, then the notice to quit was equally invalid, because it was not a notice to quit expiring upon the last day of some year of the tenancy.

As to the first defence, the plaintiff, though denying the promise, also set up the Statute of Frauds, and if ss. 1, 2, and 4 of that statute had been pleaded in the reply instead of only s. 4, though from the course this case took at the trial it must, I think, be treated as if all three sections had been pleaded, the point upon the statute is a good one, and Bruce J. was right in deciding against the defendant upon this defence.

As to the second ground of defence, I am of opinion that Bruce J. was mistaken in holding that the tenancy commenced on June 24, 1890. He appears to have arrived at this conclusion notwithstanding the express terms of the agreement that the defendant shall become tenant "as yearly tenant commencing on the 19th day of May inst.," because he thought that if he held otherwise the tenant, being under obligation to pay rent in advance, she might have to pay rent for between May 19 and June 24, when she had been turned out upon May 19; but this was fully answered by Mr. McCall for the plaintiff, who pointed out that the Apportionment Act would apply, and, even if not, as a six months' notice if given must be running when the quarterly rent payable in advance became due, the tenant would obviously refuse to pay rent for the period during which the notice to quit would prevent her occupying the premises, viz., between May 18 and June 24.

I cannot doubt that under the agreement by its express terms the tenancy commenced on May 19, 1890. I cannot bring myself to hold, as I was invited to do by the plaintiff, that when a written agreement states that a person shall become a yearly

tenant "commencing on the 19th of May," that it means that he shall become such tenant "commencing on the day after the 19th of May," or, in other words, as the plaintiff contends, "commencing from the 19th of May." This being so, the third defence arises, which is certainly technical and without merit, that although a full six months' notice to quit has been given for May 19, which was the anniversary of the day upon which the tenancy commenced, it is, nevertheless, a bad notice to quit, because it is not a notice expiring upon the last day of the year of the tenancy, but upon the day after.

It appears upon looking into the old authorities that at one time what was to be considered a reasonable notice to quit was not ascertained; but, subsequently, it became settled law that in cases of yearly tenancies half a year's notice, expiring at that period of the year at which the tenancy commenced, was the reasonable notice to be given, and, in the case of *Doe* d. *Shore* v. *Porter* (1), Lord Kenyon over a hundred years ago laid it down that a tenant from year to year cannot be dispossessed without a six months' notice ending at the expiration of a year, and, indeed, I take this to be familiar knowledge.

It has also been settled that the notice to quit must be given half a year before the expiration of the then current year of the tenancy, excepting when the rent is payable on one of the usual feast days, in which case what Tindal C.J., in *Roe* d. *Durant* v. *Doe* (2), calls "a customary half-year's notice," will suffice if given on or before one of the feast days in the earlier half of the tenancy to quit on the feast day at the conclusion of the tenancy, though there may be fewer than 182 days between the two feast days. No point was taken in that case, nor, as far as I have been able to discover, in any of the cases upon feast-day tenancies, that the notice was bad because it terminated upon the anniversary of the commencement of the tenancy; but the point taken was that the tenant had not had a full six months' notice.

The recent case of *Morgan* v. *Davies* (3) deals with these feast-day tenancies and is to the like effect.

The complaint in the present case is, not that too few days

(1) 3 T. R. 13.

(2) 6 Bing. 574.

(3) 3 C. P. D. 260.

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have been allowed to elapse between the giving of the notice upon November 17, 1893, for May 19, 1894, for that is not the fact, but it is said that as the tenancy commenced *on* May 19, the notice does not expire upon the last day of the year of the tenancy; for as it commenced upon May 19 it expired at midnight upon May 18. It has been held that, where a notice to quit at New Michaelmas would be good because the tenancy had then commenced, it was bad if given for Old Michaelmas which was twelve days later than New Michaelmas, though it had been given in ample time for New Michaelmas; Lord Ellenborough observing that if it might be given for Old Michaelmas instead of for New Michaelmas it might as well be given for any other time: *Doe* d. *Spicer* v. *Lea.* (1) In *Doe* d. *King* v. *Grafton* (2) Lord Campbell, in giving judgment, stated that, "On an ordinary yearly letting the six months' notice must expire at the end of the year"; and Erle J. said: "The authorities determine that where premises are taken on a yearly tenancy the term must expire with the year." This case does not necessarily determine the question whether a notice for the anniversary of the day upon which the tenancy commenced is or is not a good notice to quit. I can find no case, nor has any been cited, in which a full six months' notice to quit given for the anniversary of the day upon which the tenancy commenced has been held to be invalid, and indeed the cases of *Kemp* v. *Derrett* (3) and *Doe* d. *Cornwall* v. *Matthews* (4) are to the contrary effect so far as they go. In the first case, Lord Ellenborough held that where a person became tenant *on* October 29, 1810, a notice to quit upon October 29 was good; and in the latter case it was held that the tenancy commenced from Christmas and the notice to quit was good. But I must point out that in neither of these cases was there a written agreement stating when the tenancies commenced, the only statement being that they commenced *on* the respective days, and the inference drawn was that the tenancies commenced from those days. There is no place for any such inference in the present case, for the agreement is express upon the point.

It cannot be denied that the law upon notices to quit is highly

(1) 11 East, 312.
(2) 18 Q. B. 496, 501.
(3) 3 Camp. 510.
(4) 11 C. B. 675.

technical; but the technicalities are too deeply rooted in our law to be now got rid of, and if any case had been found shewing that a full six months' notice to quit given, as in the present case, for the anniversary of the day of the commencement of the tenancy was bad, I must have given effect to it; but, as no such case has been found, I do not desire to add one more technicality to a notice to quit unless compelled to do so.

I would point out that the plaintiff has only himself to blame for the difficulties he is in in this case. Had he added the words which are very ordinarily inserted in a notice to quit, "or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice," and which are inserted to avoid such a point as that now taken, all would have been in order; but the words are not there. If the notice to quit in this case had been for May 20 or 21 or any later day I should have had no doubt but that it was a bad notice; and I own that the inclination of my opinion is that the present notice is bad because it does not expire upon the last day of some year of the tenancy; but, as Lord Halsbury and Lindley L.J. are of opinion that, inasmuch as this was a full six months' notice given to quit upon the anniversary of the day upon which the tenancy commenced, it is good, though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from them, and hold that this unmeritorious technicality must prevail; and I content myself with expressing what I have said. This appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Emmet, Son, Stubbs, & Melhuish, for R. Innes, Manchester.*

Solicitors for defendant: *Smiles & Co., for J. H. Cooper, Manchester.*

M. W.

1895
Jan. 14.

BROWN *v.* WREN BROTHERS.

Evidence—Admission—Separable Statements—Presumption of Continuance of Facts admitted.

In an action for the price of goods supplied to a firm it was sought to charge W. as having been a partner in the firm at the date when the goods were supplied. The only evidence of his ever having been a partner was a letter written by him to a third person prior to the supply of the goods, in which he stated that he had ceased to be a partner some time previously:—

Held, that there was evidence to go to the jury that W. was still a partner at the date when the goods were supplied.

APPEAL from the county court of Bedfordshire.

The action was for the price of goods sold and delivered to the defendant firm of Wren Brothers at various dates between June, 1893, and February, 1894. The only evidence that William Wren, one of the defendants, had ever been a member of the firm at all was a letter written by him on January 2, 1893 to the manager of a bank with whom Wren Brothers had an account in answer to an inquiry as to whether he claimed any interest in the balance standing to the credit of Wren Brothers at the bank, which letter was as follows: "I have not banked any money this last eight months, as I have dissolved partnership with my brother last April." The county court judge held that the letter must be treated as a whole, and that the implied admission that William Wren had once been a partner could not be separated from the statement that the partnership had terminated before the goods were supplied. He accordingly withdrew the case from the jury, as against the defendant William, and entered judgment for him. The plaintiffs appealed.

Elliott, for the plaintiffs. The letter in substance contains two distinct and several statements: first, that the writer had once been a partner, and secondly, that the partnership had been dissolved at the time specified. But it was open to the jury to believe the first statement and to disbelieve the second. And in the absence of proof to the contrary there would be a presumption that the partnership admitted to have once existed still continued to exist.

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Lindsell, for the defendant William Wren. The letter must be taken as a whole, and cannot be split up into two parts in the manner contended for. A statement by a man that he was a widower could never be regarded as evidence that he was a married man at the date of the statement made.

WILLS J. I am of opinion that there must be a new trial, on the ground that the letter relied upon was good evidence of a partnership at the time that the goods were supplied. That letter clearly contains an admission that William was a partner in Wren Brothers in April, 1892, and it must be presumed that the state of things so admitted to have existed at that date continued to exist, unless the contrary be proved. No doubt the statement that the partnership had been dissolved is evidence in the defendant's favour; but it is for the jury to say what weight is to be attached to it. It is contended for the defendant that the admission of the partnership cannot be separated from the statement of its dissolution. In that I do not agree.

WRIGHT J. I am of the same opinion.

New trial ordered.
Leave to appeal refused.

Solicitor for plaintiffs: *J. G. Roberts, Luton.*

Solicitors for defendant: *Walker, Son, & Field, for Hooper, Biggleswade.*

J. F. C.

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[IN THE COURT OF APPEAL.]

IN RE ODDY.

Practice—Solicitor and Client—Bill of Costs—Taxation—Judge in Chambers, Order of—Appeal—Court of Appeal—Divisional Court—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-ss.* 1, 4, 5—*Rules of Supreme Court*, 1883, *Order* LIV., *r.* 23.

A summons for a review of taxation of a solicitor's bill of costs is a "matter of practice and procedure," in respect of which an appeal from a judge in chambers lies to the Court of Appeal, under s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and not to a Divisional Court under sub-s. 5, or Order LIV., r. 23.

IN this case Mr. H. F. Oddy, solicitor, had taken out a summons before Day J. for the review of the taxation by the master of his bill of costs against one Dudson, his client, the main question being whether certain items came within the terms of a letter from Mr. Oddy to Dudson, under which Oddy agreed to accept Dudson's retainer.

Upon the taxation the taxing master disallowed the costs in respect of the items in question. Mr. Oddy then carried in objections to the taxation as to those items; but these objections the taxing master disallowed. Mr. Oddy then took out a summons for review before Day J., at chambers, who made an order allowing the objections, and referred the taxation back to the master, but gave Dudson leave, "if necessary," to appeal. He accordingly appealed to the Court of Appeal to set aside that order, and to confirm the disallowance by the master of the objections.

Ernest M. Pollock, (with him, *T. Willes Chitty*), for Dudson, the appellant.

E. T. Holloway, for the solicitor. There is a preliminary objection that this appeal, being from the order of a judge in chambers, ought to have been brought before the Divisional Court, under Order LIV., r. 23: Rules of Supreme Court, August, 1894, r. 8, which provides that, "In the Queen's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge in chambers shall be to a Divisional Court:"

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and this practice is retained by s. 1, sub-s. 5, of the Supreme Court of Judicature (Procedure) Act, 1894 (July, 1894), which enacts that, "In all cases where there is a right of appeal to the High Court from any Court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by Rules of Court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal."

Ernest M. Pollock, for Dudson. This appeal is within the exception contained in Order LIV., r. 23. Sect. 1, sub-s. 5, of the Act of 1894 only deals with appeals to a Divisional Court "from any Court or person," an expression which does not include a judge in chambers, who is not a "Court" unless he is sitting in Court: Judicature Act, 1873, s. 39; and "person" refers to an official or special referee or an arbitrator. The order made in this case in chambers is an "interlocutory order," from which, under sub-s. 1 (*b*) of s. 1 of the Act of 1894, there is no appeal except by leave of the judge or of the Court of Appeal. Accordingly, here there was no right of appeal, but only a power of appeal if leave was given: s. 1, sub-s. 5, of the Act of 1894 refers only to cases where there is a right of appeal, and not to cases such as the present. The new rule 23 of Order LIV. was made after the passing of that Act, and follows the distinction in appeals under s. 1, sub-ss. 4 and 5, of the Act. In this case leave to appeal was given, and as the appeal is not within sub-s. 5 it is within sub-s. 4, which enacts that "In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal," and the appeal is, therefore, to this Court.

LINDLEY L.J. This is an appeal from an order by Day J. referring back the taxation of a bill of costs. One objection taken is that there can be no appeal to this Court, but that it must be to the Divisional Court. Looking at the Supreme Court of Judicature (Procedure) Act, 1894, and the rules under it, it appears to me that this is a matter of procedure, and that this is the Court to come to, and not the Divisional Court. The point is a little doubtful; but I am of opinion that this is the right Court, and that an appeal from chambers as to taxation

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comes within the words "practice and procedure" in s. 1, sub-s. 4, of the Act.

[The Lord Justice then dealt with the merits of the case, and held, upon the construction of the agreement between the solicitor and his client, that Day J.'s interpretation was right and the master's was wrong; and that the appeal must be dismissed with costs.]

A. L. SMITH L.J. The question we have to consider is whether a summons for a review of taxation taken out before a judge in chambers, by way of appeal from the taxing master, is a matter of "practice and procedure" within s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894. I am of opinion that it is.

Mr. Pollock points out that an order made upon a summons taken out for the purpose of reviewing taxation before the judge in chambers is an "interlocutory order," and he says that under sub-s. 1 (*b*) of s. 1 no appeal from any interlocutory order made by a judge will lie without the leave of the judge or of the Court of Appeal, except in certain specified cases; and that as, under sub-s. 5 of s. 1, an appellant can only go to the Divisional Court when he has a "right" of appeal—not merely a power of appeal if leave be given—his right of appeal, in a case like the present, is taken away, unless he comes within "practice and procedure" in sub-s. 4, and can come to this Court, and that this is not the meaning of the Act; and in this I agree. In my opinion, a summons for taxation is within the words "practice and procedure" in sub-s. 4, and, therefore, this Court has jurisdiction to hear this appeal.

[The Lord Justice then dealt with the merits of the case, saying that he concurred with Lindley L.J. in the construction he had put on the agreement; that the order of Day J. was right; and, therefore, that the appeal ought to be dismissed with costs.]

Appeal dismissed.

Solicitors: *Morten, Cutler & Co.; H. F. Oddy.*

G. I. F. C.

THE CLACTON LOCAL BOARD, APPELLANTS; YOUNG & SONS, RESPONDENTS. 1894 Dec. 13.

Local Government — Private Street Works — Footway — Apportionment of Expenses—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 10.

By the Private Street Works Act, 1892, s. 10: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises."

A local board, acting as an urban sanitary authority, resolved to execute certain private street works in a street which had buildings on the north side only, and was bounded on the south side chiefly by land of which the local board were owners. The works comprised the making up of the roadway, and the paving and kerbing of a footpath on the north side only; no footpath was made on the south side. The surveyor of the local board made a provisional apportionment, by which the expenses of paving and kerbing the footpath were apportioned among the owners of premises abutting on the north side only, all the other expenses of the proposed works being apportioned among the owners of premises abutting on both sides of the street, including the local board, as the owners of land on the south side:—

Held, that the provisional apportionment of the expenses of the footpath was wrong, and that they were properly apportionable among the owners of premises fronting, adjoining, or abutting on both sides of the street.

CASE stated by justices for Essex upon the hearing of certain objections to proposed works made by the respondents under s. 7 of the Private Street Works Act, 1892.

On January 17, 1894, the appellants resolved with respect to a street or part of a street in their district called the Marine Parade to execute therein certain works being private street works as defined by s. 6 of the Private Street Works Act, 1892, and their surveyor duly prepared a specification of the works with plans and sections, and an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the said Act. The resolution was duly published, and the specification, plans, &c., were duly deposited. Within one month from the publication of the resolution the respondents, as the owners of premises abutting upon the Marine Parade, by written notice served upon

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the local board objected to their proposals on the following, among other, grounds: "That the provisional apportionment is incorrect by reason of the fact that the expenses have not been apportioned according to the frontage of the premises fronting, adjoining, or abutting on the said alleged street or part of a street."

It was proved before the justices that it was proposed to make up the Marine Parade with a twelve feet footpath upon the north side only, and the surveyor had apportioned the expenses of paving and kerbing such footpath among the owners of premises abutting on the north side of the Marine Parade only. The Marine Parade had buildings on the north side only, being bounded on the south side for the most part by land of which the appellants, the local board, were the owners, such land being open to the use of the public, and used for pedestrian traffic. All the other expenses of the proposed works were apportioned among the owners of properties abutting upon both sides of the Marine Parade, including the local board, as owners of the land in question.

It was contended by the respondents that the provisional apportionment was incorrect, in that it was made upon a wrong principle; that the whole expenses of the works should have been added together and apportioned among all the owners of premises on both sides of the Marine Parade, according to the frontage of their respective premises; and that it was wrong to apportion the expenses of the footpath among the owners of premises upon the north side only.

The appellants contended, upon the authority of *Wakefield Urban Sanitary Authority* v. *Mander* (1) and other cases, that under the Private Street Works Act, 1892, if an urban authority paved a footpath on one side of a street only, the cost of such footpath must be apportioned among the owners on that side only, and that the provisional apportionment had been made upon a correct principle.

The justices were of opinion that the objection should be sustained, and made the following order: "That the provisional apportionment is incorrect by reason of the fact that the expenses

(1) 5 C. P. D. 248.

of the footpath on the north side of the Marine Parade have been separately apportioned among the owners of the premises fronting, adjoining, and abutting on that side only, and that the said provisional apportionment be amended in accordance with our said adjudication, and that the sums apportioned upon the said objectors be altered to the amounts which would be payable by them if the total expenses of the said proposed works were apportioned among all the owners of the premises fronting, adjoining, or abutting on the said Marine Parade."

The question for the opinion of the Court was whether the order of the justices was correct in point of law.

Lawson Walton, Q.C. (*Macmorran*, with him), for the appellants. The original apportionment by the local board was right. The roadway and footpath must be treated as separate works, and the footpath, which is on one side only of the road, is for the benefit of the owners on that side: it fronts exclusively upon their property. The decision in *Wakefield Sanitary Authority* v. *Mander* (1) is conclusive of the present case; there it was held that the owners of houses on one side of a street, on the other side of which was a churchyard, were solely liable to the expenses of repairing the footpath on their side of the street. There is no real distinction between the language of s. 150 of the Public Health Act, 1875, upon which that case was decided, and the language in s. 10 of the Act of 1892.

C. F. Pritchard, (*Channell, Q.C.*, with him), for the respondents. The case of *Wakefield Sanitary Authority* v. *Mander* (1) was decided under an Act which threw the liability upon the owners or occupiers of "the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, &c."; and as the expenses were incurred in respect of the footway alone, they were clearly recoverable from the owners or occupiers of premises fronting, adjoining, or abutting on the footway. In *Paddington Vestry* v. *North Metropolitan Railway and Canal Co.* (2) the expenses of flagging a footway were, under s. 1 of the Metropolis Management Act, 1890, held to be borne by the owners of houses and land on both sides of the road or street, or section of the road

(1) 5 C. P. D. 248. (2) [1894] 1 Q. B. 633.

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or street, in which the footway was situate. Under the Private Street Works Act, 1892, a street, including the roadway and footway, is treated as a whole, and the order of the justices was right, for the land of the local board clearly comes within the expression "premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred."

Lawson Walton, Q.C., in reply.

POLLOCK B. I am of opinion that our judgment should be for the respondents. From the facts it appears that the place where these proposed works were to be carried out is bounded on the north side by houses, and on the south, or sea, side by grass land. A road was laid out or made, part of it being a footpath on the north side twelve feet wide, for the convenience of the inhabitants generally and of the occupiers of these houses. The local board, in apportioning the costs of these works, treated the footpath as separate from the road itself, and ordered the owners of the houses on the north side to pay for the footpath, while the cost of the rest of the road was divided between the owners of the houses on the north and of the grass land on the south: this apportionment the justices consider to be incorrect, and they have ordered it to be amended.

Whether the order of the justices is correct depends upon s. 10 of the Private Street Works Act, 1892, which provides that the expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred are to be apportioned according to the frontage of the premises. We have, therefore, to find out who are the owners of the premises fronting, adjoining, or abutting on the street in respect of which the expenses are to be incurred. In the present case the street is entirely a new street, and it seems to me that it must be dealt with as a whole, and that all persons are liable to contribute to the expenses whose premises front, adjoin, or abut on *the street*. The only thing which militates against this view is the use of the expression "or part of a street"; but here we are dealing with a new road, and we cannot read those words as implying

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a longitudinal division, for in that case owners could be taxed at a point where no improvement was being made. The case of *Wakefield Urban Sanitary Authority* v. *Mander* (1) raised a momentary doubt in my mind; but there the section spoke of the owners of premises abutting on the part which required to be paved, which in that case was a footway; the language in the present case is very different. It is unfortunate that different language should be used in different statutes dealing with the like subject-matter; but unless there were a clear authority upon the particular language used in this statute, I should hesitate to give it the meaning contended for by the local board.

GRANTHAM J. concurred.

Judgment for the respondents. Leave to appeal refused.

Solicitors for appellants: *Chamberlain & Short.*

Solicitors for respondents: *Young & Sons.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Dec. 13, 14.

MOORE *v.* VESTRY OF FULHAM.

Mistake—Money paid under Compulsion of Law—Withdrawal of Proceedings before Judgment—Action for Recovery of Money.

The rule that money paid under compulsion of legal process cannot be recovered back applies although the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the money.

Dictum of Lopes L.J. in *Caird* v. *Moss* (33 Ch. D. 22, 36) explained.

The defendants issued a summons against the plaintiff, under the Metropolis Management Acts, to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a street in the district of the defendants. The plaintiff paid the money before the summons was heard, and the summons was withdrawn. The plaintiff having discovered that his premises did not abut on the street in question, brought an action to recover back from the defendants the amount paid by him:—

Held, that, the money having been paid under compulsion of legal process, could not be recovered back.

APPEAL from a decision of Day J., dated July 27, 1894.

On September 19, 1893, the defendants issued a summons,

(1) 5 C. P. D. 248.

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under the Metropolis Management Acts, against the plaintiff, returnable at the West London Police Court on October 3rd, to enforce payment of a sum of 35*l.* 13*s.* 9*d.*, the proportionate part of the expenses of making up a road in their district called Silvio Street, found due from the plaintiff as one of the owners of the land abutting on the road. On October 2 the plaintiff, in the mistaken belief that his property abutted upon the road, sent a cheque to the defendants for the amount. On the summons being called on for hearing it was, at the request of the defendants, adjourned till October 24, and the defendants informed the plaintiff of this fact. On October 19 the plaintiff's solicitor wrote to the defendants demanding a return of the money on the ground that the plaintiff's property did not abut upon the road, and that the plaintiff was consequently not liable, and informing them that, if the money were not returned, he should attend the adjourned hearing of the summons. The defendants replied that, inasmuch as the plaintiff had paid the money, they would be pleased to withdraw the summons without the plaintiff's attendance. Neither the plaintiff nor his solicitor attended, and, by leave of the magistrate, the summons was withdrawn. On November 17 the plaintiff's solicitor again wrote to the defendants for the return of the money. On January 30, 1894, the plaintiff issued the writ in this action for 35*l.* 13*s.* 9*d.* for money had and received by the defendants to the use of the plaintiff, and for money paid under a mistake of fact.

The learned judge held that the plaintiff was precluded from bringing the action by the fact that, after he had notice of the mistake, he allowed the summons to be withdrawn.

The plaintiff appealed.

F. Radcliffe, for the plaintiff. First, the rule relating to money obtained under compulsion of law does not apply to this case, for at the date of this action the summons had been withdrawn, and there was no legal process in existence. The rule is thus stated in Leake on Contracts, 3rd ed. p. 79: "Money obtained by compulsion of legal process cannot, in the absence of fraud, be recovered back in an action between the same parties so long as the process stands." The concluding qualification is taken from

the judgment of Lopes L.J. in *Caird* v. *Moss.* (1) The principle upon which money paid under compulsion of law is held to be not recoverable is the principle of res judicata.

[LORD HALSBURY. How is that consistent with *Marriot* v. *Hampton* (2), and *Hamlet* v. *Richardson* ? (3)]

That principle was subsequently extended to the case of money being paid in the course of the proceedings, the object being to prevent multiplicity of litigation. But no case can be found in which money has been held to be not recoverable on the ground that it has been obtained under compulsion of legal process where the legal process has been withdrawn at the time when proceedings are taken for the recovery of the money, and *Moss* v. *Caird* (1) points in the opposite direction.

Secondly, the money having been paid under a mistake of fact, the case is taken out of the general rule. It has been held that the principle of *Marriot* v. *Hampton* (2) does not apply to the case of extortion: *Duke de Cadaval* v. *Collins* (4); but the ground for permitting the recovery of money paid under a mistake of fact and money obtained by extortion is the same, namely, that it is contrary to equity for the person who has received the money to keep it. The exception in the case of extortion should therefore be extended to the case of money paid under a mistake of fact. The money has been obtained, not by reason of the legal process, but by reason of a mistake of fact, namely, the supposition that the plaintiff was a frontager, and a mistake which must have been common to both parties. In the cases within the rule there has been nothing amounting to a mistake of fact: see *Marriot* v. *Hampton* (2); *Brown* v. *McKinally* (5); *Hamlet* v. *Richardson.* (3)

Macaskie, for the defendants.

LORD HALSBURY. I am of opinion that this appeal fails. The principle of law has not been quite accurately stated by counsel for the appellant, because the principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon

(1) 33 Ch. D. 22, 36.
(2) 7 T. R. 269; 2 Sm. L. C. 9th ed. 441.
(3) 9 Bing. 644.
(4) 4 A. & E. 858.
(5) 1 Esp. 279.

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this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action. In *Milnes* v. *Duncan* (1), Holroyd J. states quite accurately what I think is the principle. He says: "If the money had been paid after proceedings had actually commenced, I should have been of opinion that inasmuch as there was no fraud in the defendant it could not be recovered back." And in *Hamlet* v. *Richardson* (2), Tindal C.J., delivering the judgment of the Court, says: "We think the rule of law is accurately laid down by Holroyd J., and that, as the money was paid in this case after the suing out (of) process to recover it, the defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the plaintiff in that action, it appears to us that no action is maintainable to recover it back." That is the broad principle, and it is manifest that the effort to confine it to a case where judgment has been delivered is inconsistent with what is laid down in all the cases, because I think in every one of them, so far as I remember, the money was paid before the process had arrived at judgment. In the case upon which such reliance has been placed, my brother Lopes, in dealing with the case then before him, not unnaturally referred to the fact of the judgment still standing, and for this reason, because the money in that case was paid under a judgment founded on the construction of an agreement. Then an action was brought to rectify that agreement on the ground that such a construction was contrary to the intention of all the parties. My brother Lopes, without going into the merits of the case, practically says this: "Why, this judgment stands now; you cannot reopen that question. You had full opportunity of commencing these proceedings while the former action was pending, and ought to have done so, and we cannot now interfere with that judgment. That judgment still stands." It is quite true that, read without connection with the matter that was then being decided, that looks as if my brother Lopes was putting a

(1) 6 B. & C. 671. (2) 9 Bing. 644.

qualification upon the general rule of law; but, when the facts are looked at, it is clear that he was doing nothing of the sort. He was referring to the fact that the money was paid in that particular case under a judgment, and that the judgment was still standing, and no effort had been made to upset it. Under those circumstances, it was a matter of course that the money could not be recovered back. I am of opinion that the judgment of my brother Day was quite right, and that the appeal ought to be dismissed.

LINDLEY L.J. I am also entirely of the same opinion. I think that the case is absolutely covered, not by one authority, but by a string of authorities, of which *Hamlet* v. *Richardson* (1) is as good a type as any. The money there was paid after a writ to recover it had been issued and served, and after an appearance had been entered. But what does that mean? It means this, that the defendant says in substance to his opponent, "I do not intend to fight you. I will pay rather than fight." If he chooses to take that course he cannot back out of it whether he discovers that he has made a mistake or does not. That is the ratio decidendi in that case and in several others. Of course, money paid under a judgment may be recovered if that judgment is set aside. The Court of Appeal in setting aside a final judgment always orders the money paid under it to be refunded. That is what my brother Lopes had in his mind in *Caird* v. *Moss*. (2) Of course the plaintiff cannot recover back here.

A. L. SMITH L.J. I also think this appeal fails. This money was paid under the threat or fear of a summons which had been taken out. That is a legal process. A summons had been taken out against the present appellant to compel him to pay this apportionment, and under that threat or fear he paid this money. A series of authorities from *Marriot* v. *Hampton* (3) to the present time has held that money paid under those circumstances cannot be recovered back. In my judgment, the point taken that the summons was afterwards withdrawn has nothing to do

(1) 9 Bing. 644.
(2) 33 Ch. D. 22, 36.
(3) 7 T. R. 269; 2 Sm. L. C. 9th ed. 441.

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with the matter. The question is, Was the money paid under fear or threat of legal process? I think it clearly was, and I think, therefore, that the action is not maintainable.

Appeal dismissed.

Solicitor for plaintiff: *W. Tyndale Moore.*
Solicitor for defendants: *T. Blanco White.*

H. C. J.

C. A. 1894 *Nov.* 30; *Dec.* 7.

[IN THE COURT OF APPEAL.]

IN RE HAWKINS. EX PARTE TROUP.

Bankruptcy—Receiving Order—Petitioning Creditor's Debt—Judgment obtained by Compromise—Power of Court to go behind Compromise and Judgment—Fraud—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7.

On an application for a receiving order, where the petitioning creditor's debt is founded upon a judgment obtained by the compromise of an action, the Court of Bankruptcy has power to reject the debt as not being a good petitioning creditor's debt if, after inquiring into all the transactions between the parties leading up to the compromise and judgment, the Court can see that the compromise, although not fraudulent, was unfair and unreasonable:—

So *held*, by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting.

Per Rigby L.J.: The Court has no power to reject the debt unless the compromise was, as between the parties, induced by the fraud of one of them, or was fraudulent in the sense of being made collusively for the purpose of representing in bankruptcy proceedings that to be a debt which in truth and reality was no debt.

APPEAL from the decision of a registrar in bankruptcy refusing to make a receiving order against H. A. Hawkins upon the petition of Captain Troup.

An action was brought by Troup against Hawkins to recover 500*l.* and interest, the amount alleged to be due on a bill of exchange drawn by one Ward and accepted by Hawkins, of which bill Troup was alleged to be the holder for value. Whilst the action was pending, terms of compromise were agreed upon between the parties. The plaintiff was to have judgment for 500*l.* and interest; but in certain specified events the plaintiff was to accept 300*l.* and interest in full satisfaction of the judgment. Judgment was signed in pursuance of the terms of the compromise. A bankruptcy notice founded on the

judgment was served upon Hawkins, and on his failure to comply with the terms of that notice, Troup presented a bankruptcy petition against him. The petition was opposed on behalf of Hawkins, and at the hearing the registrar made inquiry into, and received evidence of, all the facts and circumstances leading up to the judgment, and connected with the transactions in respect of the bill of exchange, and the compromise upon which the judgment was founded. The registrar, upon the evidence, found that Ward obtained Hawkins' signature, as acceptor of the bill, by fraud; that being largely indebted to Troup, Ward indorsed the bill to him, and that Troup's agent, Jackson, took the bill with sufficient notice of the fraud to put him upon inquiry as to its validity. In the registrar's judgment there was no special finding of fact with respect to the circumstances under which the compromise was made. It appeared from the evidence that it was made, on behalf of Troup, by Jackson, and, on behalf of Hawkins, by a firm of solicitors who had succeeded his former solicitors, and had been unable to get from them the papers relating to the matters in question. (1)

Captain Troup now appealed from the registrar's order dismissing the petition.

Lawson Walton, Q.C., and *Gregson Ellis*, for the appellant. The registrar ought not to have inquired into the question whether the appellant would have succeeded in the action if it had gone to trial. The compromise was a compromise of a disputed claim, and is a sufficient consideration for the judgment. In *Ex parte Kibble, In re Onslow* (2) (on which case the registrar appears to have relied) the plaintiff could not have succeeded in the action even if he had proved his case. Here the plaintiff could. When once the compromise was established before the registrar, and it was shewn to be a compromise of a

(1) It is thought unnecessary for the purposes of this report to set out the evidence given before the registrar with respect to the circumstances under which the compromise was made. The inferences of fact drawn, upon that evidence, by Lord Esher M.R., and Lopes L.J. on the one hand, and Rigby L.J. on the other, will be found in their Lordships' judgments.

(2) Law Rep. 10 Ch. 373.

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disputed claim, he ought not, in the absence at any rate of any evidence that it was obtained by fraud, to have inquired further into the facts and circumstances leading up to the judgment. Where a judgment has been taken by consent, it is strong primâ facie evidence against the debtor: *Ex parte Lennox, In re Lennox* (1), per Lord Esher M.R., at p. 323. It is submitted that a judgment founded on a compromise of a disputed claim is in a still stronger position. *Ex parte Banner, In re Blythe* (2), in which case the judgment had been obtained by a compromise, is not an authority against the proposition contended for, because the compromise and judgment were clearly obtained by fraud; and, further, the question was raised by the trustee in bankruptcy for the protection of the general body of the creditors, and not, as here, by the debtor for his own protection.

[They also contended that the registrar was wrong in his conclusions of fact.]

Sir Henry James, Q.C. (*H. Reed, Q.C.*, and *Carrington*, with him), for the respondent, was asked by the Court to argue the question whether or not there was a good consideration for the judgment.

The answer to that question depends on the facts. It must be considered as affecting the rights of all the creditors: *In re Fraser, Ex parte Central Bank of London* (3); and for their protection the petitioning creditor's debt must be shewn to have been a good petitioning creditor's debt in the first instance. If it was not one in the first instance a compromise such as this cannot make it one. In *Ex parte Banner, In re Blythe* (2), the Court went behind the judgment and the compromise. The decision was that, there being no good petitioning creditor's debt in fact, the judgment obtained by the compromise could not be the foundation of a good debt for the purposes of bankruptcy. The registrar rightly exercised the discretion given to him by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7, sub-s. 3. (4)

Gregson Ellis, replied.

Cur. adv. vult.

(1) 16 Q. B. D. 315.
(2) 17 Ch. D. 481.
(3) [1892] 2 Q. B. 633.
(4) Sect. 7, sub-s. 3: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the

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Dec. 7. LORD ESHER M.R. In this case an application to the registrar was made on behalf of Captain Troup to make a receiving order against the debtor, Hawkins, which might result in his being made a bankrupt. The registrar refused to make that order, and against that refusal there is an appeal to this Court. The question in the appeal is whether or not we can say that the registrar was wrong in refusing to make the receiving order. It was asked for on the ground that Hawkins was a judgment debtor to Captain Troup in respect of a judgment for 500*l.* founded, as the judgment states, upon an acceptance by Hawkins of a bill of exchange for 500*l.* There was no doubt that there was such a judgment, and equally no doubt that, as between Troup and Hawkins, the judgment was a standing and final judgment; but the registrar thought that he was bound, on certain allegations made before him, to "go behind the judgment," as it is called in bankruptcy law, to see how it came about that that judgment was obtained, and whether, according to the rules which have been laid down in bankruptcy, that judgment ought to stand as a debt upon which a receiving order should be made, or, which is, as it seems to me, the same thing, as a judgment which could be relied on in bankruptcy proceedings as a binding judgment. In going behind the judgment the registrar necessarily and inevitably received evidence of the whole transaction leading up to the judgment, and upon that evidence came to certain conclusions of fact which, unless we can see that they are wrong, we must adopt. Having come to those conclusions, he made his judicial order refusing to make the receiving order against Hawkins. It does not follow that Hawkins may not be made a bankrupt upon somebody else's petition. If he were made a bankrupt upon somebody else's petition in respect of some other debt, then the question might arise whether Captain Troup had a proper debt provable in bankruptcy; but the question, for the purposes of the present appeal, is whether he, as petitioning creditor, had a good petitioning creditor's debt [His Lordship, after stating the facts proved to the satisfaction

act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

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of the registrar, agreed in coming to the conclusion that Hawkins' acceptance of the bill was obtained by fraud on the part of Ward, and that Jackson, acting for Troup, to obtain payment of a large debt due to him from Ward, took the bill from Ward with sufficient notice of the fraud to invalidate the bill, at all events, to this extent—that Jackson took it at his own risk.]

If that were all, this would be the common case; going behind the judgment the registrar would find that there was nothing to support it, and the debt would not be a debt provable in bankruptcy. But there was another suggestion—that the judgment was founded upon a compromise of a doubtful claim; and it was argued before us that the moment that was proved you could not inquire into anything which happened before the compromise was made. This Court has now been sitting for a long time to administer the law under the Bankruptcy Act of 1883, and we have several times said (thinking that we were bound by the earlier decisions of James and Mellish L.JJ. to say it), that, where the debt relied on in the Court of Bankruptcy is founded on a judgment obtained against the debtor, the Court is not bound by that judgment, although it is and must be binding between the parties for any other purpose. We have said that the Court will go behind the judgment, and I think the cases shew that the Court will go behind a judgment by consent. I am also of opinion that a judgment obtained by a compromise does not of itself stop the Court from going behind it. We have tried to say that the Court will go into the whole transaction, because the question is not one of a dispute between the two parties; it is a matter which will affect, and materially affect, the rights of all the creditors who are not before the Court when it has to determine whether a receiving order should or should not be made, which will or may result in the debtor being made a bankrupt. The Court will go into the whole matter, and see whether upon the whole it is fair to the whole body of creditors that the man, on the particular transaction between himself and the petitioning creditor, should have a receiving order made against him. In the same way, when a creditor comes to prove in bankruptcy the Court will go behind the judgment, and inquire into the

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whole transaction which preceded it. To make a man a bankrupt is obviously a strong interference with the rights of the general body of his creditors. Each creditor is materially affected to the extent that he cannot by his own diligence get the whole of his debt. From the moment of bankruptcy, though he be the most diligent of the creditors, he has to go into equal competition with the most idle. We have, therefore, gone so far as to say that when the whole body of creditors are foolish—when they are ready to agree to things to which, in the opinion of the Court, they ought not to agree—the Court will set that agreement aside. It is the Court which is called upon to act and to administer the estate, and the Court will not take that responsibility upon itself unless it sees that the whole transaction is fair as between all the creditors. Where a judgment has been obtained by a compromise, the Court has to say, looking at that compromise and all the facts which led up to it, whether in their opinion it is a just and proper compromise. In one case I know it was said that the Court would go behind a judgment obtained by a compromise, and consider that compromise as one of the facts in the case. I myself should say that the question for the Court is whether there is, or is not, a reasonable doubt that the judgment had been obtained by one side or the other fairly. Was there a reasonable doubt at the time the compromise was made, and would the Court, when it considers the whole matter, with the knowledge it then has, have agreed to that compromise? If the compromise is found to be a reasonable one the Court will support the judgment; but if it is found not to be a reasonable compromise, although not fraudulent, then the Court will not support the judgment. For instance, I know we have said that though both parties to the compromise knew all the circumstances and agreed to it, yet if the Court finds that it was foolish, absurd, and improper, and one that ought not to have been made, they will not bind the whole body of creditors to that compromise. Still more, if the Court finds that the compromise was made when one party knew all the circumstances, and the other did not, then, even if there be no fraud, the compromise cannot be a fair one. Now, what was the case here? Jackson, representing Troup, knew—

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he must have known—that he had had notice which would make it impossible for him to recover against Hawkins upon the bill, if it was a fraudulent bill. Jackson knew that he had taken the bill after having had that notice. He could not have forgotten it when he made the compromise. He knew Ward and what his character was; he had made inquiry for the purpose of determining whether he should take the bill or not, and had been told that it was a fraudulent bill. Knowing all this, he must have known that those who were acting for the other side in making the compromise would, if they had known what he knew, never have made it, unless they were absolutely ignorant of their duty to their client. If they knew all, it was a perfectly hopeless action in the hands of Jackson, and ought never to have been compromised. But they have sworn that they did not know the circumstances; they were new solicitors who had been lately brought into the matter. One side, therefore, knew enough to make the case hopeless for them; and the other side did not know the facts of the case. Under these circumstances, I have no doubt myself that it was an unfair compromise; and if it was an unfair—I do not say fraudulent—compromise, it was one which a Court of Bankruptcy will not allow to be effective. There was no good cause of action to support the judgment, if that judgment was founded on something other than the compromise. If founded on the compromise only, it was founded on an unfair compromise. In either of those cases the Court will not allow the judgment to be utilized for the purpose of proceedings which may result in making a man a bankrupt, or for the purpose of proof in bankruptcy. I have not quoted the cases, because I have had to state this law so often that I do not think I ought to be called upon to quote a series of judgments of my own and of the members of the Court of Appeal who were sitting with me; but I have the strongest conviction that what I have now stated is the law of bankruptcy as administered by this Court, and I am, therefore, of opinion that this appeal ought to be dismissed.

LOPES L.J. I am of the same opinion. Two questions arise in this case—first, had the registrar discretion to go behind this

judgment, which was founded on a compromise? and, secondly, if he had, did he rightly exercise that discretion? That the registrar has a discretion to go behind the judgment, and refuse to make a receiving order, is clear. The rule of conduct is defined in s. 7, sub-s. 3, of the Bankruptcy Act, 1883. [The Lord Justice read sub-s. 3.] It is clear, therefore, that the registrar is entitled to go behind the judgment and inquire, notwithstanding the judgment, whether there is a good debt—and this at the instance of the debtor himself, and though the judgment itself cannot be set aside. The law cannot be more clearly and ably stated than it has been stated by the Master of the Rolls in *Ex parte Lennox, In re Lennox.* (1) He says: "It seems to me that the question is, not so much what is the right of the debtor, or what the conduct of the debtor or of the creditor has been, but rather whether the Court ought to exercise this great power, which deals not only with the particular debt of the petitioning creditor, but with the whole class of the creditors of the debtor, including the petitioning creditor—whether the Court of Bankruptcy ought to exercise its power and authority when there are the strongest grounds for believing that there is no petitioning creditor's debt upon which it can be put in motion, and the whole foundation upon which the Court is authorized and empowered to do such a strong thing as to make a receiving order, or to declare a man a bankrupt, is that a petitioning creditor's debt exists. It is not denied that at a subsequent stage of the proceedings, upon the suggestion of another creditor, this very petitioning creditor's debt, if the allegations now made were then made, must be inquired into, and that, if what is now stated were then proved, the debt would no longer be considered a debt in the Court of Bankruptcy, although a judgment had been obtained for it. The petitioning creditor's debt, on which the bankruptcy proceedings had been founded, would then be struck out altogether, and he would have no claim to interfere in the proceedings, and the Court would find itself in this position—that it had used its authority to declare a man a bankrupt upon a debt alleged to exist when there was really never any debt at all. I cannot help thinking that this goes a long way to shew

(1) 16 Q. B. D. 315, at p. 321.

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that the Court would be placed in an entirely false position. So far as the debtor is concerned, it might well be said that it was his own fault—why did he consent to the judgment? But I do not think that the power of the Court of Bankruptcy is to be exercised merely by way of punishment against the debtor. The Court ought not to be forced to act when, according to its own rules, the very foundation of its action is cut away. I think it ought in such a case to hold its hand at the very earliest stage of the proceedings, and to decline to exercise its jurisdiction." It is, therefore, I am of opinion, clear that the Court of Bankruptcy is not bound by a judgment at law, but is entitled to investigate all the facts of the case whenever, but not before, a primâ facie case impeaching the judgment is made out. Otherwise a man might defeat all his just creditors by allowing judgment to be taken by default or consent. The principle appears to be that it would be unjust and impolitic to allow a man to be subjected to the pains and penalties of bankruptcy unless it was established that there were grounds for so doing by the existence of a good petitioning creditor's debt, and unjust to the general body of creditors to permit one creditor, by means of a judgment which had no solid foundation, to obtain an undue advantage over them, and obtain payment of his alleged debt in full to their prejudice. It is said, however, that although that may be true with regard to an ordinary judgment, a judgment founded upon a compromise by the parties is a different thing, and ought not to be subjected to the same investigation as may be applied to a judgment not so circumstanced. Now, I see no distinction. In my judgment, both an ordinary judgment and one obtained by compromise may be inquired into directly, but not before, it is made out that either the one or the other has been improperly or unfairly obtained. I do not go the length of saying that it must have been fraudulently obtained; it is sufficient, in my opinion, if it is made out that the judgment was improperly or unfairly obtained.

Then comes the other question—has the registrar rightly exercised his discretion in the present case? I am of opinion that he has. I come to the conclusion that the compromise was not fairly obtained, and I mean by that that there was an amount

of knowledge on the one side of the circumstances belonging to the case, not shared in or communicated to the other side, which made the compromise unfair, and which might be described as "impar congressus." [The Lord Justice stated the facts and evidence upon which his conclusion was based.] I say, therefore, that Jackson approached Hawkins' solicitors with a full knowledge of everything which had taken place with regard to this bill, with the full knowledge that it was a fraudulent bill, and with a firm conviction that no action could be successfully maintained upon it. He approached the solicitors—who, in my opinion, knew comparatively little about it—and then effected this compromise. Can we say, under those circumstances, that this compromise was fairly obtained? I am of opinion that it would be wrong and unjust to do so. I am unable to disagree with the conclusion come to by the registrar. I think we are entitled to hold that the compromise was an unfair one; that the judgment obtained by that compromise was unfairly obtained; that we are fully entitled to consider the circumstances under which that judgment was obtained, and to say that the application for a receiving order ought to be dismissed.

RIGBY L.J. This is a case of considerable importance both with regard to the administration of the bankruptcy law and to the persons concerned. I conceive it my duty, therefore, as I differ from the view taken by the rest of the Court on the facts, and to some extent on the law, to go at some length into my reasons for so differing.

First, with regard to the general doctrine: There is, no doubt, a discretion with reference to the granting of a receiving order, but not an arbitrary discretion. It is a judicial discretion, and if, for any reason, a Court of Appeal should differ from the discretion as exercised by the registrar, it would be the duty of that Court to override his discretion. Nevertheless, there is a discretion, and that is important in the consideration of the matter. With reference to the bankruptcy law on the subject, we all know that the Court of Bankruptcy has always been considered from the first as a Court of Equity as well as a Court of Law. It has always freely resorted to the doctrines of Courts

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of Equity to guide it in its decisions; but unless there be some statutory addition to the law in bankruptcy, it must be founded either on the common law or on equity. I do not at all take the view that the equity administered in bankruptcy differs from the equity administered formerly by the old Court of Chancery, and now by the Chancery Division. That is the equity now administered by all the branches of the High Court. I think that the bankruptcy jurisdiction is made up of the common law jurisdiction together with the equitable jurisdiction, and I do not doubt that there may be additions to that jurisdiction made by statute, but by statute only. Now, looking at the origin of this doctrine that you can go behind a judgment debt (a doctrine from which I do not wish in any way to be supposed to be differing, for it is founded in equity and justice) in the Court of Chancery, it was well established that voluntary debts—debts not actually founded on a valuable consideration, though they might be specialty debts—did not enable the voluntary creditors to compete with creditors who had given just and valuable consideration. In its origin—as I read the old cases, which I do not attempt to go through, for they are well known—the doctrine that the Court can go behind a judgment was only the application of a well-known principle of Courts of Equity that you must look to see whether there was a consideration, and in the earlier cases that was the way in which the rule was expressed. The Court may inquire into the consideration for the judgment debt; and, if it finds that there was no consideration, the debt must be treated, like any other voluntary debt, as not entitling the judgment creditor to enter into competition in bankruptcy with other creditors for valuable consideration. With reference to that part of the jurisdiction it will have to be considered, when the case arises, whether that has not been altogether displaced by subsequent legislation. The Bankruptcy Act, 1869, contained a new enactment with respect to the ranking of creditors which, in the case of *Ex parte Pottinger, In re Stewart* (1), in this Court, was decided to abrogate altogether the old doctrine that voluntary creditors could not rank with those who were creditors for valuable

(1) 8 Ch. D. 621.

consideration. It would have to be considered, therefore, whether that part of the bankruptcy jurisdiction—namely, to inquire into the consideration—has not been done away with by the statute law applicable under the Act of 1869, and applicable probably, though I do not decide the question, ever since. *Ex parte Pottinger, In re Stewart* (1), decided that there had been a statutory alteration in the bankruptcy law with respect to the consideration for debts; and I think it worthy of great consideration whether the bankruptcy jurisdiction to inquire into the consideration has not been done away with by the Act of 1869, as interpreted in *Ex parte Pottinger, In re Stewart* (1), and subsequent Acts. But, apart from the question of consideration or no consideration, there was another doctrine which, so far as I can see, forms the whole doctrine of the Court of Bankruptcy upon the subject. That doctrine was that under no circumstances could a debt obtained by fraud be treated as a valid debt in competition with other creditors. Now, fraud might be of two characters. The fraud which was first adverted to, according to my recollection of the order of the decisions, was that sort of fraud which was a fraud upon the creditors—that is, where the debtor had collusively allowed judgment to be signed for the purpose of making that appear to be a debt which was not a debt. That was in the nature of a fraud, and a very gross fraud, upon the Bankruptcy Court, whose doctrine was that there should be equality only between real creditors, and not between them and creditors whose debts were fictitious or collusive, or made for the purpose of shewing in bankruptcy proceedings something which did not correspond with the reality. That was the doctrine of the bankruptcy law. In an early statute, which has been repealed, but the repeal of which in no way alters the doctrine of the Court of Bankruptcy, it was in express language provided that creditors coming into the bankruptcy proceedings must make an affidavit as to the truth and reality of their debt. That was discussed in *Ex parte Bryant* (2), and it was laid down then, and has been the law ever since, and is now the law, that to admit a creditor to establish himself in bankruptcy he must be a true and real creditor, and

(1) 8 Ch. D. 621. (2) 1 V. & B. 211.

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the debt must really be owing. So much, then, for that part of the acknowledged doctrine of Courts of Bankruptcy which depends upon the principle that no one should, by collusion, create debts which were not real debts, or should be protected in any way in respect of an alleged debt which did not really exist. That is the law now; it never has been changed. The principle is a true and equitable one, and will, I hope, always be maintained to the utmost extent. That question, however, does not arise here, because, whatever else may be said of the proceedings which led up to this judgment, they were in no sense collusive proceedings; they were in no sense intended by the parties to create a fictitious debt for the purpose of altering the administration of the assets in bankruptcy. On the contrary, I am satisfied that the question was fought, that the parties were at arm's length, and that, so far from wishing to make Captain Troup appear to be a creditor when he was not, the parties on the other side would, if they had seen their way to it, have absolutely refused to pay him a penny, or submit to judgment on any terms whatever. There remains, however, another point. Undoubtedly, if a debt has been obtained by fraud, it is not in truth and reality a debt at all; it is not really due from the debtor to the creditor. But, according to my reading of the decisions, the doctrine stops there. I find no jurisdiction on the part of the Court of Bankruptcy to inquire into the fairness or reasonableness, for instance, of a compromise, provided that that compromise is not tainted with fraud. To hold that there was such jurisdiction would be to introduce into the law of bankruptcy, with regard to judgment debts, an exception which does not run through that law, and to affect the rights of many creditors who were not judgment creditors, but whose debts, if they could be inquired into from their very beginning, might turn out to be within the rule as to fairness and reasonableness which, I understand, the other members of the Court consider applicable to this compromise. At present, as I understand the law, if a voluntary debt is created honestly—that is to say, with the intention that it shall be a debt and not a mere appearance of a debt in bankruptcy—although there is no consideration for it, yet the creditor may come and prove in respect of it in bank-

ruptcy. Undoubtedly, too, there are many improvident bargains which a debtor may enter into (assuming always that he is not doing so with a view to the creation of debts for the purposes of the bankruptcy)—bargains which he has chosen to enter into in the ordinary course of business, or of transactions between man and man—bargains creating debts which will undoubtedly prejudice the claims of, and diminish the dividends obtainable by, other creditors, but which yet are admitted in bankruptcy. The Court cannot look behind transactions which in themselves, in the absence of fraud, are legal and binding simply because they are improvident, and because the entering into them would or might materially diminish or altogether destroy the rights of other creditors in the bankruptcy. In his judgment in *In re Onslow, Ex parte Kibble* (1), Mellish L.J. gives as an illustration a gambling debt which might form the subject of a judgment. That is not a mere illustration, but it arose out of *Ex parte Marson* (2), in which it was decided that an acknowledgment for a gambling debt did not create a debt really and truly existing between the debtor and the creditor. I am dealing now with cases which are not against the policy of the law, but are cases of mere acts of improvidence. A man may give 10,000*l.* for a horse which is not worth 100*l.*, being persuaded that it will bring him in a great fortune; but, unless fraud can be shewn, that transaction is a perfectly good transaction, though it may be one which will have a most pernicious effect upon the rights of all his other creditors if he becomes bankrupt. I am unable, therefore, to accept as a test the question of the fairness of any transaction, whether it be a compromise or otherwise; and, according to my view of the cases, you must not only shew that there was inequality in the transaction, but you must shew that there was fraud, which is a very different matter.

Now, there is one case in the books—a case with which I entirely agree—in which there was a compromise entered into, and a judgment in pursuance of that compromise, and nevertheless the Court went behind, not only the judgment, but the compromise, and inquired into the truth and reality of the

(1) Law Rep. 10 Ch. 373. (2) 3 Mont. & A. 155.

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transaction. That was *Ex parte Banner, In re Blythe* (1), and if ever there was a case of fraud that was one. A gross fraud was committed, and most justly and properly, in my judgment, the Court of Bankruptcy, on the ground of fraud, went behind, not only the judgment, but the compromise upon which it was founded. According to my reading of the cases, that is the extreme to which the Courts have gone in dealing with cases of compromise. Admitting that an inquiry into all the facts must be made, the real question in the present case is, was the compromise made in the action against Hawkins obtained by fraud? I have been unable upon any of the facts and circumstances of the case to arrive at the conclusion that it was obtained by fraud. I will go further, and say that upon my view of the case the compromise was not, as a matter of fact, obtained on any inequality of knowledge between the persons representing the plaintiff in the action and those representing the defendant. The rest of the Court have come to the conclusion that they cannot disturb the registrar's findings of fact. I am not going into the question, for to me it appears irrelevant what would have been the finding of this Court upon the evidence as it ultimately came before the registrar. I have always considered the real question in the case to be whether the compromise was an actual compromise as distinguished from a transaction which was no compromise at all. That, in my opinion, is the question upon which the decision of the Court ought to turn. The compromise was made in an action on a bill of exchange. There is no doubt that Hawkins signed the bill, and therefore, primâ facie, he was liable. I accept the decision of the registrar that the signature was obtained by fraud, and that the bill was taken by Captain Troup's agent with notice of the fraud. But I place myself, as I think I am bound to place myself, in the position of the parties to the action at the date of the compromise; and, if I had to decide upon the state of facts existing then, I confess I should be of opinion that there was, not only an actual compromise not induced by fraud, but a fair compromise. I think that there was no sufficient finding of the registrar with regard to the compromise. [The Lord Justice went fully into the evidence.] The

(1) 17 Ch. D. 480.

action was brought, bonâ fide, in the sense, at any rate, that it was an action for the purpose of making Hawkins pay, not of getting him to enter into a compromise so as to defeat his own creditors. I believe, from my reading of the evidence, that the compromise was accepted with full knowledge on the part of the plaintiff's solicitors of all the material circumstances, and I think it was a binding compromise both at law and in equity, and that it was untainted by fraud in the widest sense of that word. As to unfair dealing, I should call it fraud if anything in the transaction had been shewn to be absolutely unfair. I come to the conclusion that there was a good consideration for the judgment; and, although full inquiry has been made into everything that took place before the judgment was signed, that inquiry leads me to the conclusion that the judgment was founded upon a compromise of a claim which might properly, at that stage of the proceedings, be thought to be a good claim. I am of opinion, therefore, that the judgment so obtained for 300*l.* and interest ought to stand for the purposes of proof in bankruptcy and of constituting a petitioning creditor's debt.

Appeal dismissed. Leave to appeal was refused.

Solicitors for appellant: *Cooper & Bake.*
Solicitors for respondent: *Langlois & Co.*

W. A.

C. A.
1895
Jan. 18, 19.

[IN THE COURT OF APPEAL.]

IN RE BRYANT. EX PARTE BRYANT.

Bankruptcy—Conduct of Bankrupt — Discharge— Suspension — "Undue Preference" of Creditors — Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 3 (*i*).

By the Bankruptcy Act, 1890, s. 8, the Court is required (as one of several alternatives) to suspend the discharge of a bankrupt for not less than two years if it is proved (inter alia) sub-s. 3 (*i*) "that the bankrupt has, within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors":—

Held, that, if within the three months a bankrupt pays in full a creditor who would probably (though it is not absolutely certain that he would) be entitled to a similar preference in the administration of the estate in bankruptcy, that payment constitutes an "undue preference" within the meaning of sub-s. 3 (*i*).

Semble, that even if the creditor whom the bankrupt pays in full would certainly be entitled to a preference in the bankruptcy, the payment by the bankrupt constitutes an "undue preference."

APPEAL by E. H. Bryant, a bankrupt, against an order of one of the registrars in bankruptcy, suspending the bankrupt's discharge for two years.

The ground of the suspension was stated in the order to be that "proof has been made of the following facts under sub-s. 3 of s. 8 of the Bankruptcy Act, viz. (*i*) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they became due, given an undue preference to certain of his creditors."

The bankrupt had carried on business in partnership with Samuel King. In April, 1893, King suddenly died, and thereupon, by the terms of the partnership agreement, Bryant became liable to pay the amount of King's capital to his representatives by three instalments, respectively at twelve, eighteen, and twenty-four months after his death. King's representatives required this to be done. The amount of King's capital was 7493*l.* The first instalment became due to King's representatives in April, 1894; but Bryant was unable to pay it. In May, 1894, he filed a bankruptcy petition, upon which a receiving order was made, and he was afterwards adjudicated a bankrupt. When

the bankrupt applied for his discharge, the official receiver reported that he had in April and May, 1894, within three months next preceding the date of the receiving order, made payments in full to some of his creditors, whose names and the amounts paid to them respectively were stated in the report, and that these payments constituted an "undue preference" within the meaning of s. 8, sub-s. 3 (*i*) of the Bankruptcy Act, 1890.

The creditors thus paid were separate creditors of Bryant, and the payments amounted to more that 2500*l.* The unpaid debts of the old firm amounted to 4000*l.* King's representatives were jointly liable with Bryant for these debts, though as between them and him he was primarily liable. The official receiver stated that the bankrupt's assets had realized 10,959*l.* 12*s.* 3*d.*, and it was estimated that a further sum of 300*l.* would be realized. The debts which had been admitted to proof amounted to 11,871 15*s.* 1*d.* A dividend of 15*s.* in the pound had been declared, and it was estimated that further dividends from 1*s.* 6*d.* to 2*s.* in the pound would be paid. In the course of his examination the bankrupt admitted that he had paid the creditors in question because they had done him services, or, as he said, they had been "benefactors" to him.

The debts which had been admitted to proof included a sum of 3000*l.* for which King's representatives had been allowed, by consent of the other creditors, to prove pari passu with them in respect of King's share of the capital. If King's representatives were excluded the assets would have been sufficient to pay all the creditors, joint and several, in full.

Cooper Willis, Q.C., and *Lemon*, for the bankrupt. It is a settled rule in bankruptcy that a partner cannot prove in the bankruptcy of his co-partner in competition with his own creditors. He cannot, therefore, prove in his co-partner's bankruptcy in respect of a debt due to himself until the joint creditors have been paid in full, and this rule applies equally to the representatives of a deceased partner: Williams on Bankruptcy (6th ed.), pp. 148, 149; *Nanson* v. *Gordon*. (1)

(1) 1 App. Cas. 195, 202.

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[LOPES L.J. referred to Lindley on Partnership (6th ed.), p. 740.]

The result of this rule is that, as King's representatives were not entitled to prove in the bankruptcy until the debts for which they were jointly liable had been satisfied, the assets would have been sufficient to pay all the creditors of the bankrupt, joint and several, in full, including those whom he paid in full within the three months. The creditors whom he so paid would, therefore, have obtained in the bankruptcy exactly the same preference as he gave them, and a preference which the law itself gives cannot be an "undue preference" within the meaning of (1) sub-s. 3 (*i*) of s. 8 of the Bankruptcy Act, 1890. On this ground *In re Skegg* (2) is distinguishable from the present case. Sub-s. 3 (*i*) refers to an actual preference; its application does not depend upon the intention of the bankrupt. Whatever may have been the motive or intention of the bankrupt in the present case, the creditors whom he paid did not in fact obtain any preference but that to which they were legally entitled. An "undue preference" must mean a preference contrary to law.

Herbert Reed, Q.C., and *D. M. Kerly*, for the representatives of King. A debtor on the eve of bankruptcy has no right to

(1) By the Bankruptcy Act, 1890, s. 8, sub-s. 2, "On the hearing of the application (i.e. for the discharge of the bankrupt) the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under the Debtors Act, 1869, or the principal Act, or any other misdemeanor connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines, and shall, on proof of any of the facts hereinafter mentioned, either" (inter alia) "(i.) refuse the discharge; or (ii.) suspend the discharge for a period of not less than two years."

Sub-s. 3: "The facts hereinbefore referred to are" (inter alia) "(*i*) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors."

(2) 25 Q. B. D. 505.

forestall the administration of his estate in bankruptcy, even if he pays his creditors in the same way as they would be paid in that administration. In the present case it is not true that the creditors whom the bankrupt paid in full would necessarily have had the same preference in the administration in bankruptcy. The rule that a partner cannot prove in his co-partner's bankruptcy until the joint debts have been satisfied does not apply until some joint debts are in fact proved in the bankruptcy: *Ex parte Andrews.* (1) Before the bankruptcy takes place it cannot be known whether proof of any joint debts will be made in it. The representatives of King might have paid the joint debts in full, and, had they done so, they would have been entitled at once to prove in the bankruptcy for the amount of the debts which they had thus paid, as well as for the debt due to King, and in that case the creditors whom the bankrupt paid would have had no preference.

But s. 8 deals with the conduct of the bankrupt; it has nothing to do with the administration of his estate. That is the principle of the decision in *In re Skegg.* (2) A creditor who is paid at once necessarily obtains a preference. He is saved the trouble and expense of proving his debt, and he has not to wait, perhaps a long time, for his money. Moreover, the trustee is deprived of the opportunity of investigating the alleged debt. A debtor has no right to select his own friends and give them this preference. If the application of s. 8 is made to depend upon the result of the administration of the estate, a bankrupt who had committed great offences might escape punishment because after the bankruptcy his estate had been augmented by an unexpected legacy. The argument for the appellant must go to this extent, that sub-s. 3 (*i*) would not apply in the case of a fraudulent preference if the money paid were recovered in the bankruptcy from the creditor who had received it, because in that case there would not in fact be a preference. In truth, whether there has been an "undue preference" or not must depend on the motive of the bankrupt.

Cooper Willis, Q.C., in reply. Regard must be had to the state of things at the time when the payments in question were

(1) 25 Ch. D. 505. (2) 25 Q. B. D. 505.

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made. At that time there was nothing wrong in them; they became wrong, if at all, only by reason of the subsequent bankruptcy.

Muir Mackenzie, for the official receiver.

T. D. Munns, for the trustee in the bankruptcy.

LORD ESHER M.R. In my opinion this appeal must be dismissed.

The bankrupt applied to the Court for his discharge. Upon such an application the Court is, within the true meaning of s. 8 of the Bankruptcy Act, 1890, bound to consider the conduct of the bankrupt, both before his bankruptcy and during his bankruptcy. Sect. 8 applies to the conduct of the bankrupt. It has nothing to do with the question whether he ought to be made a bankrupt or not, or with questions between one creditor and another, or with the proof of debts. Any questions arising in the bankruptcy are not within s. 8; they have to be determined under other sections and rules. Sect. 8 comes into operation when the bankrupt applies for his discharge. The administration of the bankruptcy is then at an end, and the Court has to consider the conduct of the bankrupt. That, I think, is really what was decided in *In re Skegg*. (1)

The registrar had then to consider the conduct of the bankrupt. How can you consider a man's conduct but by considering what he has intentionally done? Here the registrar has found that this bankrupt, within three months before his bankruptcy, was insolvent; for that, putting it shortly, is the meaning of being "unable to pay his debts as they became due." He must have known, or he ought to have known, that he was insolvent. He was, in fact, insolvent. Now, what did he do? He paid several creditors of his own in full during these three months, and, according to his own statement, he did so because they had done him services or because they were friendly to him. He paid them in full because he liked them better than his other creditors. He was in reality in his own mind preferring those creditors to the others; he was paying them first because he liked them best. The point which has been most ably argued

(1) 25 Q. B. D. 505.

on his behalf is this: It is true I preferred these creditors; but my doing so altered nothing, because it is absolutely certain that in the bankruptcy these creditors would, as a matter of course, have been paid in full before the other creditors, the representatives of King, over whom it is said I have preferred them. That was the proposition. But that proposition, which is stated by way of explanation, or rather by way of excuse, for it amounts to this—"I did what in my own mind was wrong, but I am excused for doing so because it did no harm"—that proposition is not true. It was not absolutely certain that those creditors whom he did pay would in the bankruptcy have been paid before the others. Mr. Reed has pointed out to us that if King's representatives had done certain things, or had abstained from doing certain things, it is not true that the creditors whom the bankrupt paid would certainly have been paid in the bankruptcy before them in full. Therefore the explanation or excuse is not a true one; and, if that be so, the bankrupt is left in this position—that within three months before the receiving order, at a time when he was really insolvent, he paid some of his creditors in full, whereas in the bankruptcy they might not have been paid in full. That is clearly an "undue preference." This is sufficient for the decision of the present case; but I cannot help thinking that it is very dangerous for a trader, at a time when he is insolvent, to take upon himself to distribute his estate, and to pay creditors, thus depriving the trustee in the inevitable bankruptcy which will shortly take place of the power of determining whether the debts which he pays are really due. But I do not think it is necessary to determine any question of this kind on the present occasion. It is enough to say that here the registrar was right in holding that this bankrupt intentionally preferred those creditors whom he paid to the others, and that the excuse which he has put forward for doing that wrong thing is not a tenable excuse.

LOPES L.J. I am of the same opinion.

This case arises under s. 8, sub-s. 3 (*i*), of the Bankruptcy Act, 1890. That section has to do with the discharge of the bankrupt and his conduct, and it appears to me that the words

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"undue preference," used in sub-s. 3 (*i*), are entirely different from the words "fraudulent preference," which are used in other parts of the Bankruptcy Act. In order to bring sub-s. 3 (*i*) into operation, it is necessary that the payment in question should have been made within three months preceding the date of the receiving order, and at a time when the bankrupt was unable to pay his debts as they became due. There is no difficulty with regard to those two matters in the present case. The payments in question were made within the three months, and there can be no doubt that at the time when they were made the bankrupt was unable to pay his debts as they became due. I think it was the intention of the legislature that a bankrupt should not be permitted, without bringing himself within sub-s. 3 (*i*), to anticipate the action of the Bankruptcy Court with an intention of preferring one of his creditors to another—that he should not take the administration of his estate out of bankruptcy into his own hands, preferring one creditor to another, even though the creditors whom he paid might or would be entitled to priority in the bankruptcy.

Take a very simple case. Suppose a bankrupt pays creditor A. rather than creditor B., what is the effect? By so doing he gives A. an advantage over B. B. will probably have to wait a long time for his money; he will have to prove his debt and submit his claim for verification. A., on the other hand, escapes all those inconveniences. Therefore, even in a simple case of that kind, the payment by the bankrupt gives the one creditor a very considerable advantage over the other.

As regards the present case, it seems to me that Mr. Reed gave an answer which entirely disposed of the contention raised by Mr. Willis, and made it clear that the preference which was given to the creditors whom the bankrupt paid was not one to which they would have been absolutely entitled in the bankruptcy, but only one to which they might have been entitled. That, to my mind, is a complete answer to the contention which has been raised on behalf of the bankrupt.

In my opinion, the registrar was right in holding that the bankrupt had by his misconduct brought himself within the provision of sub-s. 3 (*i*) of s. 8, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion.

There was undoubtedly a preference of certain creditors, and the argument on behalf of the bankrupt is that, inasmuch as those creditors must have been preferred in the administration of the bankruptcy, the preference given by the bankrupt was not an "undue preference." If that argument had been supported by the facts it would have raised important questions, which, however, it is not necessary for us to decide now. It is enough to say that the supposed necessity of the preference does not exist as a matter of fact. The argument is based upon that which is no doubt a beneficial rule of the Court, that a joint debtor with a bankrupt shall not, in respect of a claim which he has against the bankrupt, compete with his own creditors. But that rule may or may not apply. The very day after one of these preferences had been made, and before the bankruptcy existed, King's representatives, who were joint debtors with the bankrupt, might have satisfied the joint debts for which they were liable, and then, when the bankruptcy followed, no case of preference would have arisen. I think that after the bankruptcy they might pay the joint debts, and then (those debts being primarily owing by the bankrupt) prove in the bankruptcy pari passu with his other creditors in respect both of those debts and of the other debt due to them by the bankrupt. In the present case over 7000*l.* was due from the bankrupt to the representatives of King, and only 4000*l.* was due by them jointly with him to the creditors of the old firm, though as between them and him it was due primarily from the bankrupt. It is obvious, therefore, that it was very likely, the estate being fortunately able to pay a considerable dividend, that they would pay the 4000*l.* in order that they might be let in to prove for the 11,000*l.* It would be to their interest to do so, and they might have been expected to do it. But I do not think it is necessary to rely upon this, because the general rules as to preference are laid down with regard to general considerations, and you must not scan too carefully the particular facts in order to ascertain whether the preference would or would not have arisen. If we were to accede to the argument which has been addressed to us, the result would be that a surviving partner might on the eve of his bankruptcy pay

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some of his creditors in full, if only 50*l.* was due to joint creditors of the late firm, because the representatives of his late partner could not compete with those joint creditors. This would reduce the thing to an absurdity. Of course, the representatives of the deceased partner, if they had such a large claim against the bankrupt as there is here, and there were only a small amount due to joint creditors, would pay it off, and would thus destroy that preference in bankruptcy upon which it is argued that the bankrupt might safely act. In my opinion, what the appellant did was clearly an "undue preference" within the meaning of s. 8, and the registrar was right in inflicting on him the penalty of the misconduct of which he was guilty, and in disregarding the suggestion that it was not misconduct because he might not have become a bankrupt. There are certain acts which the legislature have said are to be treated as misconduct when a bankruptcy arises.

Appeal dismissed.

Solicitors: *Hepburn, Son, & Cutcliffe; Kerly, Son, & Verden; Solicitor to Board of Trade; Munns & Longden.*

W. L. C.

C. A. 1894 *Dec.* 18.

[IN THE COURT OF APPEAL.]

THE VESTRY OF THE PARISH OF ST. MARTIN-IN-THE-FIELDS *v.* BIRD.

Metropolis—Management Acts—"Drain"—"Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Local Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 250.

The defendant was the owner of an arcade consisting of a central passage, with a number of houses and shops on either side, the whole being on the property of the defendant, and there being no right of way along the passage, which was roofed, and could be closed by gates placed at each end. The drainage of the arcade was by means of a construction which ran down the central passage to a main sewer outside, receiving in its course the drainage of the houses. In an action brought to determine whether the defendant was liable to keep the central construction in repair:—

Held (affirming the judgment of the Queen's Bench Division), that the central construction was not a "drain of and used for the drainage of one building only, or premises within the same curtilage," and was therefore a

"sewer" within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and vested in and to be kept in repair and maintained by the vestry.

APPEAL from a judgment of the Divisional Court, on a special case stated in an action in which the plaintiffs claimed a declaration that the defendant was liable to execute such works and do such things to and in respect of the Lowther Arcade, Strand, in the county of Middlesex, as might be necessary and requisite to abate and keep abated any nuisance arising from the condition of the drainage of the same.

By the Metropolis Local Management Act, 1855, s. 250, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation, under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

The question was whether the central drainage arrangement of the Lowther Arcade, as hereinafter described, was a drain within the meaning of the foregoing definition, in respect of the repair and maintenance of which the owner was liable, or a sewer, in respect of the repair and maintenance of which the vestry was liable, by virtue of ss. 68 and 69 of the above-mentioned Act.

The Lowther Arcade is a passage, arched over by a common roof, with a range of houses and shops on either side of the passage. The arcade was constructed, drained, and applied to its present uses before January 1, 1856, and the defendant, for the purposes of the case, was to be deemed the owner. The houses and shops within the arcade are approached by the passage aforesaid, which is used in common by those occupying the houses and shops, and its use is essential to the enjoyment of each and every of the houses and shops, as it must be

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passed along by all people resorting thither. There are twenty-five houses and shops in the arcade, and these are let to eighteen different occupiers on leases or agreements. Some of these occupiers live in the houses over the shops; the remainder use the whole of their premises other than the shops for storage purposes. At each end of the passage there are gates and doors enabling it to be closed. When these are closed there is no access by the public to the arcade. They are closed every evening at nine, and the whole of every Sunday throughout the year; but the occupiers of the shops and houses in the arcade have at all times the right of ingress and egress to and from their shops and houses, and they do in fact exercise that right. The passage giving access to the houses and shops is wholly on the property of the owner, and there is no public right of way over the passage. The vestry of St. Martin-in-the-Fields have never exercised any powers over the premises nor spent money in any way in repairing or maintaining the Arcade, or in doing any works in or upon the same. All expenses of repairs, maintenance, and improvements have hitherto been paid for by the owner or by his tenants by arrangement with him. The drainage of the arcade is by means of a construction which commences in a dead-head at one end and runs down the centre of the arcade, receiving in its course the drainage of the houses and shops forming the arcade save of those at the other end, which abut upon the streets and drain directly into the public sewer in the streets.

The arrangements for drainage in the foregoing paragraph mentioned were constructed previously to January 1, 1856, and there is no evidence that the arrangements were made in pursuance of any combined operation by the order or direction, or with the sanction or approval, of the Metropolitan Commissioners of Sewers under 25 & 26 Vict. c. 102, s. 112.

Upon the argument of the case the Divisional Court (Mathew and Kennedy JJ.) gave judgment for the defendant. The plaintiffs appealed.

Finlay, Q.C., and *Beven*, for the plaintiffs, in support of the appeal. The arcade must be regarded as one building, or at

least as premises within the same curtilage. There may be a curtilage common to two or more houses: *Pilbrow* v. *Vestry of St. Leonard, Shoreditch.* (1) A curtilage is "a piece of ground lying near and belonging to a dwelling-house": Tomlin's Law Dictionary. The central avenue comes within this definition, and it is necessary for the convenient use and occupation of the rest of the property: *Grosvenor* v. *Hampstead Junction Ry. Co.* (2); *Marson* v. *London, Chatham and Dover Ry. Co.* (3) Whether, therefore, the whole arcade is regarded as one building, or as premises within the same curtilage, the drainage is by a drain which the owner and not the vestry is bound to repair.

Lawson Walton, Q.C., and *A. Macmorran*, for the defendant. There are in the arcade a number of different houses, and it stands on the same footing as regards drainage as any other street.

Finlay, Q.C., in reply.

LORD ESHER M.R. As a matter of common sense it is impossible to say that the Lowther Arcade, which, as described in the case, consists of a number of separate houses let to different people, with an open space or passage running between the two rows of houses, is either one building, or can properly be called premises within the same curtilage. If there is any curtilage at all it must be the passage and that only, and the houses of the arcade are not within the passage, but at its side; so that the definition in the section, "premises within the same curtilage," has no application. The appeal must be dismissed.

LOPES L.J. As regards the question whether the Lowther Arcade is one building, the matter is not arguable, because it is clear that it includes many buildings. But then it is said that all the buildings are within one curtilage. I shall not attempt to define the word "curtilage"; but it is clear that no definition that has been suggested is applicable to this case. Here are a number of houses held by different persons; each of them has a drain which carries its drainage into the central drain. The

(1) [1895] 1 Q. B. 33; in C. A. post, p. 433. (2) 1 De G. & J. 446.
(3) Law Rep. 6 Eq. 101.

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use of this last-mentioned drain is not of the restricted kind which would make it technically a "drain" within s. 250. It must therefore be a "sewer" within that section, and the 68th and 69th sections shew that the burden of keeping it in order is on the vestry.

RIGBY L.J. The definition in s. 250 of the Act deals with the drainage of one building as opposed to that of two or more. Primâ facie, in the latter case that which receives the drainage of the two or more buildings is a sewer. It is impossible to say that this is one building, and equally impossible to say that it consists of more than one building within the same curtilage. The buildings are not within the passage—they front on it; so that even if the passage could be considered to be a curtilage, s. 250 would not be applicable. I agree that the appeal must be dismissed.

Finlay, Q.C., for the plaintiffs. The plaintiffs may desire to raise the question whether, in the absence of evidence to the contrary, the central drain must not be presumed to have been legally constructed, to drain a group of houses by a combined operation, under an order authorizing the work.

LORD ESHER M.R. Our judgment is confined to the question whether the arcade is one building or premises within the same curtilage, and does not preclude the raising of any other question.

Appeal dismissed.

Solicitors for plaintiffs: *Fladgates.*

Solicitors for defendant: *Shepheards & Bird.*

A. M.

[IN THE COURT OF APPEAL.]

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PILBROW, APPELLANT; VESTRY OF THE PARISH OF ST. LEONARD, SHOREDITCH, RESPONDENTS.

Metropolis—Management Acts—"Drain"—"Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Two blocks of buildings, belonging to the same owner and containing forty-six sets of apartments, were separated by a causeway or yard twenty feet wide, of which one end was closed by a wall and the other opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway. The only access to the other block was from the public thoroughfare. The premises were drained by means of branch drains running from the sets of apartments into a main drain which ran under the causeway and communicated with a sewer. The premises were so constructed as to be enclosed by continuous boundary walls, with the exception of the opening from the causeway into the thoroughfare:—

Held, by Lord Esher M.R. and Lopes L.J. (Rigby L.J. dissenting), that, having regard to their construction, the two blocks of buildings were "premises within the same curtilage" within the meaning of the 250th section of the Metropolis Management Act, 1855, and therefore the main drain used for their drainage was a "drain" and not a "sewer" for the purposes of that Act.

By Rigby L.J.: There could not be a "curtilage" common to two messuages; and the two buildings, being separate and independent buildings, could not be "premises within the same curtilage" within the meaning of the section.

APPEAL from the judgment of a Divisional Court (Mathew and Charles, JJ.) (1) upon a case stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

The appellant appeared before the magistrate to answer a summons obtained by the clerk to the respondents for the recovery from the appellant of expenses incurred by the respondents, as sanitary authority of their parish, in necessary works of cleansing, alteration, and amendment of drains at Norfolk Buildings, situate in that parish.

The facts as stated in the case or admitted during argument were as follows.

The appellant was in receipt of the rents and profits of certain buildings called "Norfolk Buildings," in the parish of St. Leonard, Shoreditch. The buildings were erected and the

(1) Ante, p. 33.

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drains put in by the owner in 1882 without any plans having been submitted to the local authority, or any inspection or sanction of the drains by them. The buildings consisted of forty-six sets of apartments divided into two blocks, which were separated by a causeway or paved yard twenty feet wide, one block of buildings being on the north side and the other on the south side of the causeway. The west end of this causeway was closed by a wall, which was continuous with the outer walls of the buildings, and against which was a dust-bin; at the other end, which adjoined a public thoroughfare, were railings with an opening in them, by which access could be obtained from the thoroughfare. The entrance to the block of buildings on the south side was from the causeway; the only access to that on the north was from a public thoroughfare called Norfolk Gardens. This last-mentioned block of buildings had windows at the back overlooking the causeway. It was admitted, when the case was before the Divisional Court, in answer to a question put by the Court, that the dust-bin was then being used by the occupiers of the north block of buildings as well as by the occupiers of the south block of buildings; but it was stated in the Court of Appeal by the appellant's counsel that that had only been the case recently, there having been, when the buildings were first erected, another dust-bin for the use of the occupiers of the north block of buildings, which had since been removed. It appeared from a plan which was before the Court of Appeal, but which was not made evidence by the case, that these buildings were so constructed that the outer walls of the two blocks of buildings, together with the wall at one end of the causeway and the railings placed across the other end, formed a continuous wall or boundary enclosing the area occupied by the buildings and the causeway, with the exception of the opening left in the railings by which access was obtained to the causeway from the thoroughfare. The question was raised in the Court of Appeal whether the wall at the end of the causeway belonged to the owner of Norfolk Buildings or not; but there appeared to be no distinct evidence on the subject.

The drainage of the buildings was by means of twelve branch drains running north and south from each set of apartments into

a main drain running east and west under the causeway into a sewer within 100 feet of the blocks. The main drain was a single nine-inch pipe. The branch drains were inserted into the main drain through holes cut in that pipe. No order of the vestry had ever been made for draining either of the blocks by a combined operation.

In November, 1891, the inspector of nuisances appointed by the vestry gave a separate notice in writing, in respect of each block, to the appellant to forthwith do certain specified works of alteration and amendment to the main and branch drains. The requisitions of the notices not being complied with, the works specified were ultimately done by the vestry. The amount expended in doing them was demanded of the appellant, and, payment not being made, the summons was issued.

The magistrate decided that, having regard to the provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), as to the construction and maintenance of drains and sewers, the alleged main drain in question, draining blocks of houses by a combined operation, was a "drain" and not a "sewer" within the meaning of the Act. (1) He therefore held that the appellant was liable to pay the sum claimed by the vestry as being the expenses duly and reasonably incurred by them, and made an order upon the appellant for payment thereof.

The question for the opinion of the Court was, whether the magistrate's decision was correct in point of law. The Divisional Court affirmed the order of the magistrate, not on the grounds taken by him, but on the ground that the main drain was the drain of, and used for the drainage of, premises within the same curtilage.

(1) By s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), it is provided that "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain,' interpreted as aforesaid, applies."

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Haldane, Q.C., and *R. Woodfin*, for the appellant. These two blocks of buildings are separate and independent premises, and cannot be said to be within the same curtilage. The causeway cannot be considered as a curtilage common to both of them. There is nothing to shew that it was intended for the use of both the blocks of buildings. On the contrary, the structure of the buildings shews the reverse, for one of the blocks of buildings has no doors opening from the causeway, and any occupant of apartments in that block would have to go round by the public thoroughfare to get to the causeway. It was admitted during the argument before the Divisional Court, no doubt, that occupiers in that block did then use the dust-bin, as well as those in the other block; but the admission must not be carried farther than the actual terms of it warrant, and there is no evidence that they had done so ever since the buildings were erected. The user admitted cannot be treated as anything but casual and permissive. Even if there had always been such user, it would not prove anything but an easement. The term "curtilage" in its proper sense means a small yard or piece of ground belonging to one building, and in a looser sense may mean the whole area occupied by such building and yard; but there cannot be a curtilage common to two independent buildings. The test is whether land would pass on conveyance of the building as curtilage. [They cited *Travis* v. *Utley* (1); *Marson* v. *London, Chatham and Dover Ry. Co.* (2)]

Finlay, Q.C., and *Lewis Thomas*, for the respondents. This structure was a "drain" for the drainage of "premises within the same curtilage" within the meaning of the section. It does not seem to be denied that this causeway or yard was the curtilage of one of the blocks of buildings. It is contended for the respondents that the proper inference from the construction of the buildings and the evidence as to user is that the yard was common to both blocks of buildings, and that the whole together formed one curtilage. It was used for the drainage of both blocks; both had windows looking into it, and the dust-bin at the end of it was used by both. The admission was no doubt

(1) [1894] 1 Q. B. 233. (2) Law Rep. 6 Eq. 101.

only as to the existing user of the dust-bin; but an inference may be drawn from such user as to the purpose for which it was originally intended. The owner of the premises was guilty of a wrongful act in doing what he did, because he erected the buildings and made the drain to communicate with the sewer without depositing any plans or obtaining the sanction of the vestry. It would be strange if by doing a wrongful act a man could throw on the ratepayers the burden of repairing the structure wrongfully constructed.

Haldane, Q.C., in reply, cited *Vestry of St. Martin-in-the-Fields* v. *Bird.* (1)

LORD ESHER M.R. The question is whether the structure, which has been made and used as described in the case, is a "drain" or a "sewer" within the meaning of the Metropolis Management Act, 1855. The Divisional Court have held that it was a drain. The ground of their decision appears to have been that it was made for the purpose of draining what was really one curtilage. The question depends upon the construction of s. 250 of the Act. I do not think the words of that section, upon which the present case depends, are to be construed with regard to considerations derived from conveyancing law. In my opinion, the question does not depend upon conveyancing law, but on considerations relating to the mode of building, the object with which buildings have been erected, and the manner in which they have been used. I think that the facts as they appeared before the Divisional Court shew that, as a matter of building, the scheme of the owner, by whom these premises were built, was that a certain defined space should be used for building these blocks of buildings as they were built, and making this causeway between them, for the purpose of their being all one set of premises, in the centre of which should be this causeway for use as a yard for the whole set of premises. The fact that the space so employed was not large is a matter to be taken into account; because, if a very large number of buildings were built round a large open space, as in the case of a "square," no one could say that such a "square" was a space

(1) Ante, p. 428.

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of ground which could within the meaning of the Act be one curtilage. The comparatively small extent of this piece of ground appears to me to be an essential consideration. The plan of building seems to have been that this small piece of land should, when the buildings were completed, have one continuous boundary wall all round it. It has been alleged that a portion of the wall, by which it was surrounded, did not belong to the building owner. I doubt whether that can be true. That portion of the wall may not perhaps have been solely his: it may have been a party wall. But whether he had a right to do so or not, he utilized it as part of the boundary wall of the space he was enclosing for building purposes. The result, when he had finished his operations, was that there was this small square of land, surrounded by a boundary wall, with blocks of buildings on two sides of it and between the buildings an open space, which was paved as a yard. It was not left as a thoroughfare, through which carriages or carts or foot-passengers could pass. It was left merely as a yard. The buildings do not appear to have been built in such a manner that they would be let as separate houses or for long terms. They appear to have been built so that the owner might use them for the purpose of letting them out in sets of apartments, probably on weekly tenancies. Looking at the buildings themselves, as they would appear to any one looking at them, and having regard to the purpose for which they were apparently constructed, I should say that the whole of the premises so enclosed within a continuous boundary wall were intended to be used as substantially one building. It is apparent I think on the face of it that this was to be so. We are told that the buildings contained forty-six separate sets of apartments. The occupiers of these apartments would have to use the common staircases and other conveniences belonging to the premises. Apart from the dust-bin at the end of the yard, I should come to the conclusion that the yard was constructed in order that all the occupiers of the different apartments might use it as part of the enjoyment of the rooms which they rented. It appears to me that, on the face of the thing, any one looking at these buildings, after they were built and before they were occupied, would come to the conclusion that in truth this yard

within the boundary walls enclosing the premises was meant to be used by every one who occupied apartments within those boundary walls.

Under the circumstances which I have mentioned, I think that these two blocks of buildings and the yard which is between them are all one set of premises within the same curtilage within the meaning of the 250th section of the Metropolis Management Act, 1855. The owner of the premises constructed a drain under this yard for the purpose of collecting the house-sewage from these blocks of buildings, and carrying it into what was undoubtedly a sewer. It appears to me that what he so constructed was a drain and not a sewer. It is, in fact, according to the ordinary use of language, a drain made from these buildings to communicate with the public sewer. If there were no Act of Parliament in question, I am sure that nobody would call this a sewer, or anything else but a drain. It is contended that we are obliged by the Act of Parliament to give a meaning to the word "sewēr" other than its natural meaning, and that we must therefore treat this structure, which was meant for and really is a drain, as a sewer. I think we ought to scan the words of the Act very narrowly before we arrive at such a conclusion, and so throw on the vestry a burthen in respect of this structure, which was made by a private individual for his own purposes, and with regard to the mode of construction of which the vestry had nothing to say. I do not think that the construction which the appellant seeks to put on the Act is the right one, and I agree with the view taken by the Divisional Court.

It has been argued that we cannot decide against the appellant's contention consistently with our decision in the Lowther Arcade case, *Vestry of St. Martin-in-the-Fields* v. *Bird*. (1) But the facts of that case were in my opinion entirely different from those of the present. There the passage between the shops and houses on either side of the arcade was not merely a passage for the common use of the occupiers of those premises as distinct from other people. It was intended that any one should be able to go up and down the arcade except at night, and we

(1) Ante, p. 428.

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came to the conclusion that no one could sensibly call that passage a curtilage, or speak of the premises constituting the Lowther Arcade as being all in the same curtilage. Having regard to the difference in the facts, I do not think that the decision in that case was in any way inconsistent with what I am now deciding. For those reasons I think this appeal should be dismissed.

LOPES L.J. I am of the same opinion. The question raised is whether the structure in question is a "drain" or a "sewer" within the meaning of the Act. If it be the former, the expenses which have been incurred in relation to it must fall upon the private individual; if the latter, they will fall upon the ratepayers.

To determine this question, it is necessary to consider the language of the 250th section of the Act. That section provides that the word "drain" shall mean and include any drain of, and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. It has been suggested that the expression "premises within the same curtilage" only applies to the case of one building, such as a mansion-house, which has stables or other out-buildings connected with it, and cannot include the case of several buildings like the present. I do not think that is the meaning of the section. I think it includes the case of several buildings which are included in the same curtilage—which have a curtilage which is common to all. We have been asked to determine this case upon considerations arising from the law of real property. In my opinion that is not the right way in which to decide it. I think that it ought to be decided with reference to the character of the buildings themselves which have been erected; that we must ascertain the facts with relation to that, and apply to those facts the definition in the section. We have been asked to go outside the four corners of the case; but I decide upon the facts as they appeared before the Divi-

sional Court. The conclusion at which I arrive upon those facts is, that this causeway or yard is the curtilage of both the blocks of buildings. According to the definition cited by Mathew, J., in the Court below, a curtilage is a "little garden, yard, field, or piece of void ground lying near and belonging to the messuage, a little croft, or court, or place of easement, to put in cattle for a time, or to lay in wood, coal, or timber, or such other things necessary for household." If that be the true definition of the meaning, I cannot imagine anything that more completely answers it with relation to these blocks of buildings than this yard or causeway. It is a yard adjoining and belonging to them in the manner contemplated by the definition. I entirely agree on this point with what the Master of the Rolls has said. Looking at the buildings themselves, it will be seen that there are continuous walls surrounding a plot of ground with buildings on either side, and in the centre a space which is paved, and which was obviously left for the benefit of the occupiers of both those blocks of buildings. For these reasons, I come to the conclusion that the decision of the Divisional Court was correct. It was urged that, if we so held, our decision would be inconsistent with the Lowther Arcade case, *Vestry of St. Martin-in-the-Fields* v. *Bird*. (1) That case appears to me to be as different from the present case as can be. I think Piccadilly might almost as well be called a curtilage to the adjoining houses as the Lowther Arcade to the premises abutting upon it. The passage through the Lowther Arcade is used in the daytime by the public generally, and is not intended merely for the use of the occupiers of the adjacent houses. Our decision in that case does not appear to me to conflict at all with the view I am taking in the present case.

RIGBY L.J. This case depends on the interpretation to be put upon s. 250 of the Metropolis Management Act, 1855. But, before proceeding to construe the section, I think we must consider what is the general meaning in law of the expressions used in it. I am not aware that, apart from statutory definitions, there is any specific distinction in law between a "drain" and a

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"sewer." As a matter of conveyancing, I should say that the one expression would generally have the same meaning when used in a conveyance as the other. The question now arises what under the section is the difference between a "drain" and a "sewer." I will read the section, in the first instance, as it would stand without the words "or premises within the same curtilage," because it appears to me that by so doing some indication is given of the leading idea of the section. The section would then run: "The word 'drain' shall mean and include any drain of, and used for the drainage of, one building only, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed . . . and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain,' interpretated as aforesaid, applies." Therefore, leaving out the particular words which have to be construed, we find that, where no question as to a curtilage arises, a "drain" is to mean that which is used for the drainage of one building only and made for the purpose of communicating with a "sewer," i.e., that into which the drainage of two or more buildings or premises occupied by different persons is conveyed. So far, having regard to the words I have read, it appears to me that a case like the present, where there are forty-six sets of apartments occupied by different persons, the drainage of which is conveyed into this drain, is as strong a case for the application of the description of a "sewer" given by the section as one in which it is a question of the drainage of half-a-dozen ordinary dwelling-houses. Then we have the words "or premises within the same curtilage." What is the meaning of the word "curtilage" in the section? It is possible of course that it may have in this Act a meaning somewhat different from its ordinary legal meaning. I observe that it cannot have exactly the same meaning as is assigned to it by the definition in some of the books, such as Jacob's Law Dictionary; because, when the section speaks of premises within the same curtilage, it treats the site of the premises as forming part of the curtilage. So also another Act, namely, 7 & 8 Geo. 4,

c. 29, uses the term "curtilage" in a sense somewhat different from its ordinary legal meaning, when it says that no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of burglary, unless there is a communication between them. That Act speaks of the dwelling-house as being within the curtilage, and treats the curtilage as meaning all within the boundary which includes the dwelling-house and the curtilage in the ordinary sense. I am inclined to think that the word "curtilage" is often used in that sense, and that in this section it must be intended to have that meaning. But I know of no case in which the word "curtilage" is used as applying to something which is common to two or more messuages. When I consider the reasons given by Mathew J. in the Court below for his decision, I find that he says that the yard is within the curtilage of both buildings. He then quotes the definitions of "curtilage" given by the law dictionaries, and says that the case is brought within those definitions. I must say that I cannot agree with him on that point. The definitions to which he refers are somewhat precise, and I think they give the word "curtilage" a more restricted sense than that in which it is used in this Act; but they both treat a curtilage as something belonging to a single messuage or dwelling-house. The definition quoted from Stroud's Judicial Dictionary, p. 174, is, "a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, a little croft, or court, or place of easement, to put cattle in for a time, or to lay in wood, coal, or timber, or such other things necessary for household." It seems to be essential to this definition that the curtilage should belong to *a* messuage. The second definition quoted is that in Jacob's Law Dictionary, where a curtilage is defined as "a court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house." The idea of its belonging to a particular messuage seems to run throughout both definitions. It may be, as I have said, that in this Act the word is not used in its exact legal sense, but I am not aware of any popular sense of the word as distinct from its legal sense which would justify the interpretation given to it by the Divisional Court.

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I know of no authority either in legal or popular phraseology for the use of it as meaning merely a fence or boundary. Treating the words of the section as equivalent to "premises within the same ring fence" appears to me to give rise to this difficulty. I do not think it is legitimate to take one element of the legal definition of a "curtilage," namely, smallness, and to exclude another, namely, that it must belong to one messuage. In this case we have, it seems to me, at any rate two separate messuages, one on one side of the yard, and one on the other: and I do not see how it can be the curtilage or part of the curtilage of both.

It has been suggested that the consent of the vestry was not obtained to the owner's making this drain communicate with the sewer, and therefore that the drain was illegally made. It would however, as I understand, be equally wrongful whether it was made for the drainage of one or of more than one set of premises; and it seems to me that it was the duty of the vestry to look after the sewers and to prevent this from being done, and therefore it was partly owing to their neglect of duty that the thing was done. That being so, I cannot see how the case comes within the doctrine that a man cannot get any advantage from his own wrong.

I do not find anything in the Act, unless it be in the word "curtilage" itself, on which a distinction can be made for the present purpose between premises belonging to one and premises belonging to more than one owner. Suppose two persons had purchased separate portions of this piece of land, and they had by arrangement between them agreed respectively to build such blocks of building as were built in the present case in precisely the same manner as these were built. It could hardly be denied that in that case there would be a separate drainage of two separate buildings. But I do not see, so far as the purview of the Act is concerned, that there would be any difference between that case and the present. In that case some rights in respect of the yard would no doubt be given to the owners and occupiers of both blocks. There must be a right to access of light from and drainage down the yard given to the owner and occupiers of the block which had no access from the yard.

Again, there is this difficulty in transforming "curtilage" into "boundary," which does not seem to me a mere conveyancing technicality, but a matter of substance: suppose the ownership of the two blocks of buildings were severed, I think that as "curtilage" the yard could only belong to one of the buildings, as being the curtilage of that building by virtue of the stricter interpretation of the term "curtilage." Suppose, after these buildings were complete, the owner of the property had sold to another person the north block of buildings, what would be the effect? If, when the system of drainage was completed, these premises were within the words of the Act, I do not see how anything that might happen afterwards with regard to the devolution of the property could affect the application of the Act. If the north block had been conveyed away without the other block, without the express grant of any right or easement in respect of the yard, I apprehend that the right of drainage under the yard would impliedly be given, not by way of property in the soil, but by way of easement; because, on the division of property, in the case of quasi easements of an apparent and continuous nature, a grant is implied. Again, if it were shewn that a practice had existed, while the property was undivided, for the occupiers of the north block of buildings to pass along the yard and make use of the dust-bin, possibly an easement would be established. That would depend on the evidence; but I cannot imagine any case in which any property in the yard would, without being expressly conveyed, go with the block sold by way of conveyance of the soil. These considerations appear to me to shew that this yard cannot be "curtilage" to these two blocks of buildings even in the wider sense of the term which I have indicated.

I must say that I should not, upon consideration of the physical structure of these buildings, have come to the conclusion that there was evidence of an intention on the part of the original builder that the occupiers of the north block of buildings should use the yard as suggested. If that had been the intention, I think that block would have had back-doors opening upon it. It seems to me that it would be a very strong thing to impute an intention that the occupiers of that block

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should use the yard, although they had no direct access to it, and would have to go right round by the public thoroughfare to get to it; and I do not think that the mere existence of the dust-bin is any evidence of such an intention. Moreover, as I have pointed out, the right of user is one thing; the curtilage, which is the soil itself, is another. I can see nothing in the special case from which it can be inferred that there was any such intention as suggested with regard to the soil of the yard itself. An addition appears to have been made to the statements of the case in a somewhat irregular manner in regard to the dust-bin. I do not think that that admission ought to be taken as going beyond its express terms. The admission appears only to have been that it was the existing practice for the occupiers of the north block of buildings to use the dust-bin, not that it had been the practice since the buildings were erected. It does not seem to me that that admission carries the case much further.

As I have said, I conceive that in law a "curtilage" means something which belongs to *a* messuage; and that the term as used in the Act is intended to apply to such cases as that where there is an important messuage and other buildings connected with it which are spoken of as being all included in the curtilage of that messuage. It is said that this ought not to be treated as a question of conveyancing, but I fail to see how the matter can be tested in any other way. Mathew J., in the Court below, appears to have come to the conclusion that these were premises within the same curtilage according to the common law sense of the term "curtilage." But I do not understand that my learned brothers treat the case from that point of view. They appear to think that we are entitled to give a special meaning to the word "curtilage" in this Act, and to treat the word as used in the Act as susceptible of interpretation without regard to its ordinary legal meaning. I might perhaps be inclined to agree in that view, but for serious difficulties that occur to me. If the ordinary legal meaning of the word "curtilage" be altogether cast away, it seems to me that there is really no definition at all, and it would be difficult to limit the extent of the boundary which would constitute one curtilage for the purposes of the Act.

My learned brothers take the view that the Lowther Arcade case, *Vestry of St. Martin-in-the-Fields* v. *Bird* (1), is altogether different from the present; but I confess that the decision at which the Court there arrived appears to me to govern this case. I apprehend from the facts stated in that case that there was no public right of way through the arcade, and that, if the gates having been closed over night, they were not reopened the next morning, no wrong would have been done to the public. It has been suggested that the occupiers of the shops had no greater right of way than the general public. But according to my recollection they could always get into the arcade at any time of the night as well as the day. A beadle was stationed at the entrance who closed the entrance to the general public at the time appointed by the proprietor, but it was his duty to let in the actual occupiers of the houses in the arcade at any time. These facts appear to me to be quite inconsistent with the notion that the arcade was a public highway, for such a highway cannot be closed to the public. The landowner may have a gate upon it to keep out cattle, or prevent cattle straying, but he cannot lock the gate as against the public. The incidents of the Lowther Arcade, as described in the case of *Vestry of St. Martin-in-the-Fields* v. *Bird* (1), appear to me to be substantially the same as those in this case. Indeed, this appears to me to be an a fortiori case in one respect, because in this case only the block of buildings on one side had access to the yard, whereas in that case the houses on both sides had access to the arcade. It appears to me that in that case it might just as easily as in the present be said that the inference was the owner intended the intermediate strip of land between the houses to form part of one set of premises with the houses on each side, and therefore the whole was one set of premises within the same curtilage. In my view that case concludes the present; but upon the construction of the language of the Act the other members of the Court take a different view.

Appeal dismissed.

Solicitors for appellant: *S. E. Lambert.*

Solicitor for respondents: *H. M. Robinson.*

(1) Ante, p. 428.

E. L.

C. A.

1894
Dec. 20.

[IN THE COURT OF APPEAL.]

THE KENT COUNTY COUNCIL, Appellants *v.* VIDLER and Others, Respondents.

Highway—Extraordinary Traffic—Person by whose Order Traffic is Conducted—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), s. 23.

The respondents contracted to deliver ballast for the construction of a railway, and arranged with several owners of traction engines the terms on which they would convey the ballast from the respondents' wharf to the place of delivery. From time to time when ballast was required the respondents arranged with one or other of the owners of the traction engines to haul it to the place of delivery. They exercised no control over the user of the engines, the weights carried, or the route followed. The carriage of the ballast caused extraordinary traffic whereby the road was damaged. A complaint by the authority liable to repair the road against the respondents to recover the expense of the repairs was dismissed by the justices. On a case stated:—

Held (affirming the judgment of the Divisional Court), that the respondents were liable under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as the persons by whose order such traffic, the aggregate amount of which had caused the damage, had been conducted.

Appeal from a judgment of a Divisional Court on a case stated by justices.

At a special sessions of the peace holden at Cranbrook, in the county of Kent, the respondents were charged with having caused extraordinary traffic and excessive weight to be conducted along a main road within the petty sessional division whereby damage was caused to the highway, and the appellants incurred extraordinary expense in repairing the same. From the case it appeared that one Firbank was contractor for the construction of a railway, and required a large quantity of ballast, the amount of which was not specified, which the respondents agreed to supply at a fixed price per ton, to include delivery at such places on the railway as from time to time should be indicated by Firbank. No evidence was given that the ballast was to be delivered within a certain time after the place of delivery was indicated. The ballast was lying at or to be brought to the respondents' wharf, and thence to be delivered in fulfilment of the contract. The respondents had horses and carts of their own; but the con-

tract price was such that the respondents could not themselves deliver it by horses at the price, and delivery by traction engines was in their opinion the only plan for making a profit. There was delivered to Firbank under the contract, upon orders received by the respondents, or by orders given direct by Firbank to the traction engine proprietors hereinafter mentioned, ballast amounting in the aggregate to 1555 tons, which was delivered at places on the railway to reach which it was drawn along the main road described in the complaint. The carriage of the ballast was certified by the surveyor of the appellants to have caused extraordinary expenses in repairing the road, by reason of its being extraordinary traffic and excessive weight thereon. The respondents on receiving orders from time to time for the delivery of the ballast arranged with three proprietors of traction engines to haul the ballast from the wharf to the places indicated for delivery, and there deliver it. The respondents exercised no control over the proprietors of the traction engines as to the time for delivery, the engines they used, the weights they carried, the route they followed, or otherwise. The traction engine proprietors had previously hauled a good deal of material for the respondents, and always by traction engines and trucks, for the purpose of fulfilling contracts of the respondents. The respondents on receipt of the first order from Firbank arranged with one of the proprietors of traction engines to haul the ballast to the place of delivery. No evidence was given to shew that any directions were given by the respondents as to the mode or time of delivery. The proprietor came to the wharf and loaded on trucks attached to his engine thirteen tons of ballast. The respondents' clerk, on hearing from the proprietor how much ballast was loaded, issued a delivery ticket for the amount addressed to Firbank, and describing the mode of haulage as "by Phils' engine," Phils being the name of the former owner of the engine which hauled the ballast; and similar entries were made in the respondents' books debiting the amount to Firbank, and crediting it to the proprietor of the engine. The delivery ticket and entries were merely for the purpose of ascertaining the quantity delivered to Firbank under the contract. The two other traction engine proprietors only hauled by their

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traction engines a small quantity of the ballast supplied by the respondents.

The damage caused by this extraordinary traffic and excessive weight was in part attributable to the use, by the traction engine proprietor who hauled the greater portion of the ballast, of a defective engine, in part to the improper working of one of his engines, and in part to the engines being taken over the road at times when the weather was wet, and also at times when the road was still weak owing to the breaking up of recent frosts.

The respondents contended that the ballast had been carried on the order of the proprietors of the traction engines as independent contractors, and that the damage could not be said to arise from the orders of the respondents within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

The appellants contended that the respondents were liable as if they had delivered it by their own engines, even though the proprietors of the traction engines might also be liable.

The justices decided that the respondents were not, within the meaning of s. 23, the persons by whose order the traffic in question had been conducted.

The Queen's Bench Division (Grantham and Lawrance JJ.) reversed the decision of the justices, and remitted the case.

The respondents appealed.

Dickens, Q.C., and *F. Low*, for the respondents, in support of the appeal. The traffic was not ordered by the respondents within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (1), as they did not order the time or mode or

(1) 41 & 42 Vict. c. 77, s. 23, enacts, "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

road at and by which the ballast should be carried, and had no control whatever over the engines used or the mode of using them. The notices they gave to the owners of the traction engines from time to time were not orders to conduct the traffic, and so the justices have found. In order to succeed, the county council must shew that the justices could not, in law, come to the conclusion at which they arrived.

[They cited *Lapthorn* v. *Harvey*. (1)]

E. Tindal Atkinson, Q.C., and *Hohler*, contra. The facts stated shew that the respondents intended that the ballast should be drawn by traction engines, and their directions to the owners amounted to an order to so carry it. The thing to be considered is the aggregate amount carried, and that was carried by order of the respondents. Traffic which amounts to extraordinary traffic might be so sub-divided that none of the actual carriers of it could be liable for carrying an extraordinary amount, and unless the person who is responsible for and directs the carriage of the whole is liable no one would be.

[They cited *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (2), *Hill* v. *Thomas* (3), and *Williams* v. *Davies*. (4)]

Dickens, Q.C., in reply.

LORD ESHER M.R. This appeal must be dismissed.

The question is whether the respondents used the road by way of extraordinary traffic. That there was such traffic cannot be doubted, and it consisted in all the traffic taken by all the traction engines over the road. It may be that if the case of one of the owners of traction engines is taken his user of the road would not amount to extraordinary traffic; but it is clear that if the whole of the traffic is taken it amounted to extraordinary traffic.

The question is, who ordered that traffic? Firbank had to obtain ballast for the construction of the railway, and he entered into a contract with the respondents, who were to supply the ballast from time to time as Firbank might require. The respondents found that carrying the ballast themselves with

(1) 49 J. P. 709.
(2) 30 L. J. (Ex.) 81.
(3) [1893] 2 Q. B. 333.
(4) 44 J. P. 347.

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their own horses and carts would be too expensive, and they therefore resolved that the work should be done by means of traction engines. They might have agreed with some person to have the contract taken off their hands; but this they did not do. What they did was to agree with certain owners of traction engines to employ them at a certain rate. When the respondents received a notice from Firbank of the amount he wanted, they directed one or other of the owners of traction engines to carry the ballast required, and it is plain it would have to be carried along this road. The respondents gave orders to the different owners of traction engines at different times, and though the carrying out any one order might not give rise to extraordinary traffic the carrying out of all the orders did constitute such traffic, and made the respondents liable under the Act.

Something was said about excessive weight; but I take it that term is applicable to each body of traffic separately while it is on the road, and that the whole weight carried at different times cannot be added together so as to constitute excessive weight.

I do not think the respondents gave an order for the use of any particular engine; but that is not a question it is necessary to go into. The case shews that there was extraordinary traffic, and that it was ordered by the respondents.

RIGBY L.J. In this case we are asked to say whether as a matter of law the decision of the justices was right.

The state of things appears to have been that when Firbank sent to the respondents to say that he wanted ballast delivered, the respondents went to some one of the owners of traction engines with whom they had a general arrangement as to the carriage of the ballast. The statements in the case as to the carrying out of the first order given by Firbank to the respondents makes it plain that whatever the traction engine owner who was employed did was done by arrangement with the respondents, who were informed of the quantity that was taken and within certain limits of the time at which it would be taken. The sum and substance of the matter is that 1555 tons of ballast were taken along this road, and the respondents saw what was done and approved of its being done and ordered it. I am of

opinion, therefore, that by the order of the respondents successive deliveries were made, causing in the aggregate the extraordinary traffic found by the case. The judgment of the Divisional Court was right and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Palmer & Bull, for Brennan & Turner, Maidstone.*

Solicitors for respondents: *Sole, Turner, & Knight, for W. C. Cripps & Son, Tunbridge Wells.*

A. M.

STOCKTON FOOTBALL COMPANY *v.* GASTON.

1895 *Jan.* 14.

Practice—Attachment—Notice of Motion—Affidavit in Support—Service—Rules of Supreme Court, 1883, *Order* XLI. *r.* 5; *Order* LII., *r.* 4.

The copy of the affidavit intended to be used in support of a motion for attachment, which, by Order LII., r. 4, is required to be served with the notice of motion, must state that the order is indorsed with the memorandum pointing out the consequence of neglecting to obey it, which is required by Order XLI., r. 5, and, if such statement is omitted, the service is insufficient.

APPLICATION for a writ of attachment against the defendant for neglecting to comply with an order, made by the district registrar at Stockton, that the defendant should, within thirty days, file an account of the sums received and paid by him while acting for the plaintiff company as their secretary. The action was commenced on February 9, 1894. On May 2 judgment was signed against the defendant. On May 8 an order was made that he should furnish an account within fourteen days. Proceedings for attachment were taken on this order, but were afterwards dropped, and further time was given to the defendant. On October 13 the order which it was now sought to enforce was made by consent. On October 18 a copy of this order was served on the defendant, and on December 12 notice of motion for attachment was served on him, with an affidavit, to which was exhibited an office copy of the order of October 13, duly indorsed as required by the Rules of the Supreme Court,

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1883, Order XLI., r. 5; but it was not alleged in the affidavit that the order was so indorsed when served on the defendant.

Yarborough Anderson, for the plaintiffs, in support of the application. It is true that by Order XLI., r. 5, "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.: 'If you, the within named A. B., neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order].'" But the mere irregularity in failing to comply with the terms of this rule cannot invalidate the service in a case like the present, where it is shewn that the defendant had ample notice of what was required of him, and no injustice can have been done: *In re a Solicitor* (1); *Petty* v. *Daniel* (2); Annual Practice, 1895, p. 938. Order LII., r. 4, provides that "where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." The authorities collected in the note to that rule seem to shew that it does not apply to affidavits relating to procedure only, such as affidavits of service.

KENNEDY J. It is clear that applications of this nature ought to be made in strict conformity with the rules of Court, and therefore, by the terms of Order XLI., r. 5, the order required to be obeyed must be served, with an indorsement upon it, stating the result of neglecting to obey the order. The defendant would be entitled to assume that the affidavit served with the notice of motion contained the evidence relied on. In the present case the service was clearly irregular, for the affidavit did not shew that the order of the registrar, when served on the defendant, had indorsed upon it any memorandum such as is

(1) W. N. (Dec. 9, 1883) 188. (2) 34 Ch. D. 172.

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required by the rule to which I have referred. No doubt an affidavit was afterwards served, with the order, duly indorsed, exhibited to it, but this does not amount to a sufficient statement that the order did in fact contain the necessary indorsement at the time when it was served on the defendant. The proceedings are penal, and the rules must be strictly observed. The service of the order on the defendant was irregular, and in my opinion the irregularity is one which cannot be condoned.

LAWRANCE J. concurred.

Application refused.

Solicitors for plaintiffs: *Eldridge & Spratt, for C. J. Archer & Parkin, Stockton-on-Tees.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

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Jan. 22.

BAXTER *v.* FRANCE AND OTHERS.

Practice—Third Party Procedure—Defendant claiming against co-Defendant —Setting aside Service of Notice—Order XVI., *rr.* 52, 55.

When a third party notice claiming contribution or indemnity is given by a defendant to a co-defendant, the question whether there is a case for contribution or indemnity should be raised on the application for directions under Order XVI., r. 52, and not by an application to the Court or a judge to set aside the service of the notice.

APPEAL from an order of Day J., at chambers, reversing an order of a master.

The action was brought for ejectment and mesne profits. It appeared that one of the defendants, France, as beneficial owner, had conveyed to his co-defendants certain property which the plaintiff claimed in the action. The other defendants, who were purchasers from France, issued to him a third party notice under Order XVI., r. 55, claiming indemnity. On application by France to a master, this notice was set aside on the ground that the claim of the other defendants was not a claim for indemnity within the meaning of the rule. The learned judge reversed the order of the master.

The defendant France appealed.

Spearman, for the appellant. The defendant France was

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before the Court as a party to the action, and, therefore, under Order XVI., r. 55, a notice was all that was necessary. By that rule the procedure under rule 52 (1) is applicable to such a case, and part of that procedure would be that the person brought in as a third party could appeal against the order. In this case there was no order to appeal against; but he was entitled to apply to set aside the service of the notice: *Towse* v. *Loveridge*. (2) On that application he is entitled to have the question whether the claim is one of indemnity or not decided. The claim, if substantiated, is not for indemnity, but for damages. If France cannot apply to set aside the service of notice he will be unable to question the propriety of the notice, because on an application for directions the question whether the claim is really one for indemnity cannot be raised, and at that stage it must be taken to be for an indemnity: *Barton* v. *London and North Western Ry. Co.* (3)

[*J. Eldon Bankes*, for the respondent, referred to *Pontifex* v. *Foord* (4), in which it was held that, on an application for directions, the judge at chambers was right in refusing to give directions on the ground that the case was not one of a claim for contribution or indemnity within the rules as to third party procedure.]

That decision is inconsistent with *Barton* v. *London and North Western Ry. Co.* (3), which is a case in the Court of Appeal.

J. Eldon Bankes, for the respondent, was not called on.

LORD ESHER M.R. In this case several of the defendants have given a third party notice to their co-defendant, and we are asked to set aside service of this notice. There is no order

(1) Order XVI., r. 52: "If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a judge for directions, and the Court or a judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

(2) 25 Ch. D. 76.

(3) 38 Ch. D. 144.

(4) 12 Q. B. D. 152.

of a Court or a judge allowing a third party notice to be issued; so that we are asked to sit in appeal in a case in which there is no order appealed from, and the appellant has no right to be here at all.

The rule applicable to the case is Order XVI., r. 52. The third party has appeared pursuant to the notice, which is exactly the case provided for by the rule. The rule further provides that the defendant giving the notice may apply to the Court or a judge for directions. On that summons for directions, the first thing to be considered under the rule, is whether the Court or a judge is "satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part." If satisfied of this, the Court or a judge "may order the question of liability to be tried." In this case there must be a summons for directions, and I have not the least doubt of the meaning of the rule being that if, in considering the application, the judge is of opinion that there cannot be any question of contribution or indemnity, he will direct that no such question is to be tried. It seems to me that then is the proper time to determine the matter. I can find no authority against this view. The case of *Barton* v. *London and North Western Ry. Co.* (1) was cited; but that case does not seem to me to support this application. Kay J. was asked for directions, and he gave them; and then two of the parties who had been brought in under a third party order appealed against it. The Court pointed out that the order allowing a third party notice could not then be appealed from, because the time for appealing had been allowed to go by. The Court then went on to consider the order made on the application for directions. In the present case, when an order is made on an application for directions, we may be called on to consider it; but at present there is no order in existence against which an appeal can be raised, and we must, therefore, dismiss the present application.

LOPES L.J. I am of the same opinion. In this case there is an action against several defendants some of whom desired to

(1) 38 Ch. D. 144.

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make their co-defendant a third party in the action, and thereupon issued a notice under Order XVI., r. 55. The defendant served with this notice has appeared to it. A very different state of things arises when the person whom it is desired to make a third party is a co-defendant and when he is not so. In the latter case an order is required; but in the former, notice may be given without any order having been obtained. The terms of Order XVI., r. 52, are strictly applicable to this case: under that rule a judge on an application for directions has to consider if he is satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, and if he is satisfied he makes whatever order is necessary to determine the question of liability. The conclusion I come to is that this is a case in which an application to set aside the service of notice cannot be made. The proper course is to raise the objection to the third party notice on the summons for directions. It is for the judge at that time to determine whether there is a primâ facie case for indemnity or contribution. It is said that this view is in conflict with *Barton* v. *London and North Western Ry. Co.* (1); but that was a different case, because the third parties brought in were not co-defendants, and it was properly said that the parties complaining of the order to bring them in should have appealed at once against that order, but that as they let the time pass for doing so it was not afterwards open to them to raise that question.

RIGBY L.J. I am of the same opinion. This is an appeal from an order of a judge refusing to set aside service of a third party notice not made under an order but given, as it might be, without such an order. It seems to me that the judge could not set aside that service. Then it is said if that be so the defendant served has no remedy, and reference is made to *Barton* v. *London and North Western Ry. Co.* (1) The utmost that the case decides as to this matter is that the person desiring to set aside an order under the third party procedure must take the first opportunity of appealing against it. That case has no bearing on the one before us, because until there is an order under

(1) 38 Ch. D. 144.

Order XVI., r. 52, for directions, there is no order of the Court which can be appealed against.

Application dismissed.

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Solicitors for the applicant: *Black & Fisher, for Nutsey & Payne, Shrewsbury.*

Solicitors for the respondents: *Patersons, Snow, Bloxam, & Kinder, for Salt & Son, Shrewsbury.*

A M.

[IN THE COURT OF APPEAL.]

C. A. 1895 *Jan.* 11, 14, 15.

IN RE AN ARBITRATION BETWEEN LORD GERARD AND LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Minerals—Purchase by Railway Company of all subjacent Strata but Coal—Compensation—Railway Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77–85).

Where a railway company purchase under their statutory powers some of the underlying minerals as well as the surface of land, the rights and obligations which arise from the purchase as between the company and the owner of the remaining minerals, are determined by the mining clauses (ss. 77–85) of the Railway Clauses Consolidation Act 1845, not by the common law.

Therefore, where a railway company gave to a landowner notice to treat in respect of certain land, including the minerals thereunder, except coal:—

Held, that, in the assessment of the compensation payable to the landowner under the notice to treat, he was not entitled to compensation in respect of coal which he would not be able to get without taking away support from, and removing a portion of, the minerals purchased by the company; but that the right to such compensation could only arise upon proceedings under the above-mentioned sections, when the time arrived at which the landowner was desirous of working the coal.

APPEAL from the order of a Divisional Court (Mathew and Kennedy JJ.) making absolute a rule nisi to set aside a submission to arbitration on the ground of improper reception of evidence by the arbitrator (1).

The facts were as follows. The appellant, Lord Gerard, was tenant for life in possession of certain lands underneath which were valuable seams of coal, and through which ran the line of the respondents, the London and North Western Railway Company. On June 3, 1889, the railway company, being about to widen their line, gave to Lord Gerard, in the exercise of their statutory

(1) [1894] 2 Q. B. 915.

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powers, a notice to treat in respect of certain lands and hereditaments "together with the stone, sand, clay, and gravel within and under the same," and, with the assent of Lord Gerard, shortly afterwards entered upon and used the land. On July 23, 1891, the company gave to Lord Gerard a second notice to treat in respect of other land "together with the mines and minerals thereunder, except all mines, beds, and seams of coal," and subsequently entered upon and used the land. On May 7, 1894, an agreement was entered into between Lord Gerard and the railway company, by which it was referred to an arbitrator to determine the purchase-money to be paid for the value of the estate and interest of Lord Gerard in the lands and minerals taken, and the compensation payable to him for damage by severance or otherwise injuriously affecting his other lands and minerals in consequence of the exercise of their statutory powers by the railway company. The subjacent and adjacent coal was not being worked at the date of the arbitration, nor was there any immediate prospect of its being worked by the mine-owner or his lessees. Evidence was tendered before the arbitrator in respect of the following heads of compensation claimed by Lord Gerard. It was alleged that coal would have to be left unworked on account of the obligation to afford subjacent and adjacent support to the land and minerals purchased by the company, and on account of the fact that, owing to the narrowness of the seams, the coal could not be got without also removing part of the minerals purchased by the company; and it was further alleged that, by reason of the purchase by the company of the minerals under the surface, coal on one side of the railway could not be worked from the workings on the other side, as might otherwise have been done, without committing a trespass, and therefore the coal could not be worked at all, or at any rate without the expense of sinking an independent pit on that side of the railway. The company contended that the mining clauses of the Railway Clauses Consolidation Act, 1845 (ss. 77–85) applied, and that claims such as those made by Lord Gerard could only arise when in the ordinary course of working the time arrived for getting the coal, and therefore the evidence so tendered was inadmissible. The arbitrator admitted the

evidence, and thereupon, with a view of obtaining the decision of the Court on the question, a rule nisi as above mentioned was obtained on behalf of the railway company which upon argument was made absolute.

Sir R. E. Webster, Q.C., and *Moulton, Q.C.* (*Pollard*, with them), for the appellant. The authorities shew that the effect of the notice to treat is to create the relation of vendor and purchaser between the landowner and the railway company with the usual incidents of that relation, except so far as they may be modified by the provisions of any statutory enactments applicable. It is contended that the provisions of the mining clauses of the Railway Clauses Consolidation Act, upon which the company rely, do not apply to the case of minerals taken by the company, but to the case where the surface only is taken. The railway company, as purchasers of certain strata of minerals beneath the surface, obtain the common law right of purchasers to support for what they have bought, and their vendor cannot work the coal so as to interfere with that right of support. So, also, it is clear that the vendor in such a case cannot in derogation from his own grant remove or work through a portion of the minerals which he has himself conveyed. The compensation under the notice to treat, therefore, must include the value of the coal which the owner is thus prevented from getting. The compensation in such cases includes any damage by severance, and it matters not whether the severance is horizontal or vertical; whether it is a case where access from one portion of a landowner's surface land to another is cut off by the strip of land on which the railway runs, or a case where access from workings on one side of the line to coal on the other is cut off by the purchase of intervening minerals. The compensation to which the coal-owner is entitled in respect of being so prevented from working his mines is assessable at once. The mining clauses of the Railway Clauses Consolidation Act, 1845, have only to do with the protection of the railway and works from the result of working mines not taken by the company; they have nothing to do with minerals of which the railway company have become purchasers, and in respect of which they obtain the common law

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rights of a purchaser. The railway company are not compelled by their Acts to become owners of anything more than so much of the upper crust of soil as is necessary for the railway and works; and it is with regard to support of these or possible interference with them by the working of mines below that the mining clauses are intended to provide, the intention being that the company shall not be compelled to pay for support to the railway and works until the necessity for it arises. If the sections from 77 to 85 be examined, it will be found that they only contemplate the case of damage to the "railway or works" by mining, and are not appropriately worded to meet the case of damage to or interference with other minerals. If the company choose to become owners of minerals below the surface, with regard to those they are in the position of purchasers at common law, and must pay for the common law rights which they acquire as part of the compensation to be paid on the purchase. The meaning of "land" for the purposes of these sections is the surface and so much of the soil below as is necessary to be excavated for the purpose of making the railway and works. It does not include mines or minerals. In a case where the mining clauses apply, the minerals remain the property of the landowner, and his rights are not affected, the question of interference with them being postponed until he desires to work under or near the railway. Where minerals are taken by the company, they acquire at once, as against the owner of minerals below, the common law rights of a purchaser. The mining clauses do not in that case preserve his right to interfere with the minerals which he has sold. *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (1) was a case in which surface only was purchased by the company, and does not govern the present case. [They also cited *Caledonian Ry. Co.* v. *Sprot* (2); *Elliot* v. *North Eastern Ry. Co.* (3); *Great Western Ry. Co.* v. *Bennett* (4); *Midland Ry. Co.* v. *Robinson* (5); *Errington* v. *Metropolitan District Ry. Co.* (6); *Pountney* v. *Clayton* (7).]

(1) [1893] 1 Ch. 427.
(2) 2 Macq. 449.
(3) 10 H. L. 333.
(4) Law Rep. 2 H. L. 27.
(5) 15 App. Cas. 19.
(6) 19 Ch. D. 559.
(7) 11 Q. B. D. 820.

Sir H. James, Q.C., and *H. D. Greene, Q.C.* (*Page*, with them), for the respondents.

[THE COURT intimated that the only question they need argue was whether the appellant was prevented from getting the coal, because he must in order to do so trespass on or deprive of support the minerals which he was selling to the company.]

The judgments of Lord Halsbury and Lord Watson, in the case of *Holliday* v. *Mayor of Wakefield* (1), on legislation precisely similar to the mining clauses of the Railway Clauses Act are clear authorities to the effect that those clauses apply where minerals are taken by the company as well as the surface. No injustice is done to the coal-owner, if those clauses apply; for, if they apply, the effect is that, when he wants to do so, he can work his coal in "the manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district," even though the effect may be to damage or interfere with the strata conveyed to the company, subject to the obligation to give them notice previously in order that, if they think it necessary that the coal should be left unworked, they may compensate him for not working the coal. It was held in the case of *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (2) that the mine-owner could work downwards through the surface which had been sold to the railway company to get the mineral, if that were the usual mode of working in the district, even though the railway might thereby be destroyed. The same principle would apply to working horizontally through minerals sold to the company. At common law, where the upper stratum of land is granted away, reserving the mines, without express stipulation the power to get to the mines through the surface so granted away, if necessary, is held to be impliedly given. With regard to the right of support, the right of the grantee of the surface at common law is not to have the coal left unworked, but only to support, which might be provided by artificial means. If the mining clauses apply, the company acquire no right of support on their purchase, and the mine-owner can work the mines, although by so doing he lets

(1) [1891] A. C. 81. (2) [1893] 1 Ch. 427.

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down the land purchased, if, when the occasion arises, the company do not compensate him for not working.

Sir R. E. Webster, Q.C., in reply.

LORD ESHER M.R. In this case the railway company on two occasions gave notice to Lord Gerard that they intended to take compulsorily certain portions of his land. The land which they so proposed to take included, not merely the surface, but land below the surface. There were below the surface of the land various minerals, such as gravel and clay, and also coal. The company's notices did not include the coal, but included the other minerals. That which they so proposed to take was none the less land because part of it consisted of minerals. It has been determined by authority, and I think it would be clear without authority, that the word "land" in the Railway Clauses Consolidation Act does not mean merely the surface or superficial crust of the land. The Act does not use the term "surface." The word "land" means any land, including minerals, which the company propose to take. What they take, they take as "land." The law allows them to take the whole or a portion of the land. If any portion of the land is composed of mines or minerals, they may take the rest of the land and leave those mines or minerals. Here they proposed to take the whole of the land with the exception of the coal mines. I am of opinion that, wherever the company seek to take compulsorily from a landowner part of his land, leaving a mine, the case is governed by the group of sections in the Railway Clauses Consolidation Act commencing with s. 77. It appears to me that that group of sections is the law by which in such a case the rights and obligations of both parties are to be determined, to the exclusion of any common law right that might otherwise arise from the relation between the parties. The rights which arise from that relation are statutory, and all questions, both as regards compensation and other matters, are to be governed by the Act of Parliament. I should put that construction on the Act without authority; but I think that the case of *Holliday* v. *Mayor of Wakefield* (1) in the House of Lords is a conclusive authority in favour of it. The proposi-

(1) [1891] A. C. 81.

tion which I have laid down seems to me to be stated in express terms by Lord Watson at pp. 96, 97 of the report, and also, though not so explicitly, by Lord Halsbury at p. 93.

By s. 77 of the Railway Clauses Consolidation Act, 1845, it is provided that "the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." Here the company have purchased land, namely, the surface and certain minerals, not being coal, under it, and under that land there are coal mines. That being so, the terms of this and the subsequent sections appear exactly to apply. Then, by s. 78, if the owner of mines lying under the railway, or within the prescribed distance, or, if no distance is prescribed, within forty yards therefrom, be desirous of working the same, he must give to the company notice of his intention to do so as provided by the section. Therefore, although the mine remains his, his right to work it as and when he pleases is taken away, and he cannot work it without giving notice to the railway company. The purpose for which that notice is to be given is that the company may have an opportunity of compulsorily buying the coal, as it seems to me, or, at any rate, the right of preventing him from working it—it is not necessary to determine which. If the company take that course, the compensation in respect of the coal is then, and not till then, to be determined. It was argued that those sections did not apply in this case, because the company took not only the surface or the surface with the ordinary soil under it, but were also taking certain minerals below the surface. I have already said that I cannot accept that view. There is nothing, as it appears to me, in the words of the Act which supports it. On the contrary, the case seems to come within the very words of the sections. One of the points taken was that compensation in respect to this coal ought to be assessed at once, because the coal could never be worked. One must

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Lord Esher M.R.

therefore look to these sections to see whether there is anything which says that compensation in respect of coal which is not taken must be assessed at once, if it can be shewn that the coal can never be worked. I will assume for the moment that it is true that the coal can never be worked; but it may be that the coal-owner will never want to get it. The price of coal might go down, and, under the circumstances that might arise in the future, having regard to the character of the coal, it might not be worth the owner's while ever to work the mines. That being so, is it reasonable that the owner should at once be paid a large sum of money for being prevented from getting the coal? It is impossible to get the result contended for without adding words to the statute, which I do not think we are entitled to do. But I do not think it is true that the mine-owner cannot work this coal. At common law, where, by agreement, the upper portion of land is sold, the mines being reserved, without any express stipulation, I think a necessary implication arises in favour of the mine-owner that, if he cannot get the coal otherwise, he may, working in a reasonable way, bore through the upper land which is sold to get at the mine. Under the statute, where the upper portion of the land is taken compulsorily, leaving the mine, I think the implication must be the same. It cannot be intended that the mine-owner should be in a worse position where his land is taken compulsorily than in a case where he has agreed to sell it. It would be manifestly unjust if it were so. It does not, to my mind, make the least difference whether the barrier, which has to be worked through to get at the coal, is vertical or horizontal. I should, in the absence of authority, come to the conclusion that, under the statute, there must be such an implication to avoid a manifest injustice. But the case of *Ruabon Brick and Terra Cotta Company* v. *Great Western Ry. Co.* (1) is a clear authority that that is the effect of the statute, where land is bought in the exercise of the statutory powers, the mines being excepted. It appears to me that all the propositions urged by the appellant fail. It is not true that he cannot get at his coal, and, if it were true, the time has not arrived when compensation is assessable. If, when the time comes, the company elect not to

(1) [1893] 1 Ch. 427.

pay him compensation, I think he will have a right to get the coal and, so far as may be necessary for that purpose, to work through the land purchased, although the railway is thereby let down, or other consequences follow injurious to the land purchased. For these reasons I think the appeal must be dismissed.

LOPES L.J. I am of the same opinion. Evidence was admitted at the arbitration, which was held to assess the compensation payable in this case, of the value of adjacent and subjacent coal which it would be necessary to leave for the support of the land taken, or which for other reasons it was alleged could not be worked by the appellant. The question arises whether this evidence was properly admitted. It appears to me that it was not admissible. The appellant is the tenant for life of the strip of land proposed to be taken for the railway, under and adjacent to which there were coal mines belonging to him. The company gave him two notices, the substance of which was that they proposed to take the land in question, including the surface and all the strata below the surface, sand, stone, clay, gravel, or whatever there might be, with the exception of the coal. The appellant contends that under these circumstances he is entitled to compensation in respect of the coal on the following grounds. He says that he will have to leave lateral and vertical support for the minerals purchased, and therefore cannot work large quantities of coal adjacent and subjacent to such minerals. Further, he says that he cannot work subjacent seams of coal because he cannot do so without taking away a portion of the soil purchased, and that he cannot get at a large portion of his coal without working through a portion of the minerals purchased, which he is not entitled to do. He therefore says that he is entitled, at the present time, to compensation in respect of the coal which he will be so prevented from working. If his contention is correct, it appears to me that the company will be in no better position than they would have been in, if the coal had been included in the notices to treat as well as the other minerals. It is contended that the case is not the same as if the company were taking the surface only without any minerals. It is admitted that in that case the

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group of sections in the Railway Clauses Act beginning with s. 77 would apply; but it is said that the effect of the company's taking minerals under the surface is to render those sections inapplicable; and, that being so, because the coal cannot be obtained without interfering with those minerals which have become the property of the company, and without destroying the support afforded by the coal to them, and also because there is a severance and the workings cannot be carried from one side of the line to the other, compensation is at once payable. I think that the answer to these contentions is that these matters are all completely provided for by the group of sections beginning with s. 77 of the Railway Clauses Consolidation Act. It appears to me that these sections apply not only to cases where the surface only is purchased, but to all cases where any seam of mineral below the surface is left unpurchased. I understand that to be the view expressed with regard to similar legislation by Lord Watson and Lord Halsbury in *Holliday* v. *Mayor of Wakefield*. (1) The former said, in giving judgment in that case: "The Mines Clauses are, in my opinion, equivalent to an exception (even in cases where minerals are taken) from the provisions of s. 6 with respect to compensation. These clauses are framed in general terms, and appear to me to be applicable to the case of all minerals, save those which are expressly purchased and conveyed to the undertakers." Lord Halsbury said: "No compensation, I think, for injurious affecting can at any time be demanded under the 6th section, since I think all rights of compensation are exhaustively dealt with under the mining sections." I think those expressions of opinion are authority in favour of the view that this case is entirely governed by the statutory code relating to cases where mines are not taken which begins with s. 77. I will not refer to the sections at length. But by s. 77 it is provided that mines under the land purchased shall be deemed to be excepted unless they are expressly included; and by s. 78 it is provided that, if the owner of any minerals under or within a certain distance of the railway wishes to work them, he shall give notice of his intention so to do to the company; and then, "if it appear to the company that the working of such

(1) [1891] A. C. 81.

minerals is likely to damage the works of the railway," they may proceed to give notice to treat as to compensation for such minerals. The only observation I desire to make on these words is this: If the contention for the appellant is correct, the power of determining whether damage is likely to be occasioned to the railway is, in such a case as this, taken away from the railway company. If compensation is to be assessed at the present time in respect of the coal, the railway company will not have what they were apparently intended to have, viz., the power of determining at a subsequent period whether injury is likely to be occasioned by the workings. It may be that the appellant's workings will never reach the coal under the railway, or, if they reach it, it may turn out that there will be no risk of their endangering the railway company's property. In my opinion, the judgment given by the Court below was correct, and I desire entirely to adopt the words in which their conclusions on the subject are expressed at the end of that judgment. (1)

RIGBY L.J. The question is by what law the case is to be decided: whether we are to travel out of the provisions of the Railway Clauses Consolidation Act, 1845, and invoke the assistance of the common law doctrines applicable to cases where the property in one stratum of the land has been severed by agreement from that in the others. In my opinion, that question has long ago been settled by the case of *Great Western Ry. Co.* v. *Bennett.* (2) Lord Cranworth, in a passage of his judgment in that case, which has been approved of by Lord Herschell in *Midland Ry. Co.* v. *Robinson* (3), said: "It was obviously the intention of the legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and, if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not

(1) See [1894] 2 Q. B. at pp. 921, 922. (2) Law Rep. 2 H. L. 27.
(3) 15 App. Cas. 19.

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to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface." It is to be observed that, though Lord Cranworth uses the word "surface," it is plain that he only uses it as a convenient phrase to express, not merely the upper crust of soil, but all except minerals which are not taken by the company. I think we may read in the passage, in the place of "surface," "land taken by the company," whether it includes merely the upper crust or also other subjacent strata. We are, therefore, excluded from considering what the legal relations would be at common law between the respective owners of the separated portions of the land in the case of a purchase of a part of the soil by agreement. The appellant has not, I think, succeeded in shewing that the mining clauses of the Railway Clauses Consolidation Act, 1845, do not effectually and in terms provide for all cases as between a mine-owner and a railway company which takes land excepting minerals beneath it. It was argued that a great injustice would be done, unless we introduced exceptions of various kinds into the words of the Act, and held that it did not apply to all cases, but only to the particular case where the surface without any minerals is taken by the railway company. It would require a very strong case of injustice to entitle us to do anything of the kind. To my mind, the argument entirely failed to shew any such injustice. It appears to me, on examination of the provisions of the Railway Clauses Consolidation Act, that the intention was to give the owner of mines under a railway rights which he would not otherwise have possessed in return for common law rights of which he was deprived. Take the case of the owner of minerals not beneath, but within forty yards from, the railway. As the Master of the Rolls pointed out, by the provisions of s. 78 of the Act, the owner of such minerals is prevented from working them without giving notice to the company, and giving them the opportunity of compensating him for not working those minerals. He is, therefore, deprived of a valuable right. The circumstances might be such, and the railway might at the particular spot be so constructed, that the lateral support of the minerals might not be necessary. In that case at common law the owner of

the mine could work the minerals right up to the railway, and, even if lateral support were required, the mine-owner might work the minerals, provided he supplied that support by artificial means, and the railway company could not object. Therefore, the mine-owner is placed by the Act under obligations and liabilities which would not exist at common law, and in return he is to get the benefit of these clauses. It was argued that it was monstrous to suppose that the mine-owner could derogate from his own grant by working through the minerals which had been actually bought and paid for by the company. But where an owner has sold the surface, reserving the mines, the implication even at common law would be that, if the circumstances of the case rendered it proper, the mine-owner might sink a shaft through the surface for the purpose of getting at the minerals. Again, suppose in such a case it were a question of working by outstroke from mines of the mine-owner under his adjacent land, and by reason of a fault a portion of the soil which had been sold were interposed between the workings under the adjacent land and the coal under the surface of the land sold: could the purchaser say that only mines were excepted, and that the mine-owner would be guilty of a trespass if he touched any part of the subjacent soil which was not minerals? That is not the ordinary law on the subject. The law is that, where there is an exception of minerals, there is a right, if necessary, to use the ordinary and proper means of working in order to get the minerals excepted, even although it may involve interference with the land sold. It does not seem to me that there is any such injustice as it was attempted to shew. As I have already said, I think that, when these clauses are examined, it will be seen that they are intended to be substituted for the common law and to form a complete code on the subject. The scope of those clauses, so far as this matter is concerned, may be sufficiently expressed by saying that under them there is to be no compensation except as and when the occasion for it arises. They are intended mainly for the benefit of the railway company, and having regard to the advantages given to them, it seems to me that it would be a strange thing if they should be able by their action to except cases from their operation so that they should not apply in favour

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of the mine-owner. In my opinion, when the case of injury to the mine-owner, which has been suggested, arises, there is ample provision for compensation to him, but not till then.

For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Meynell & Pemberton.*

Solicitor for the respondents: *C. H. Mason.*

E. L.

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ATTORNEY GENERAL *v.* JACOBS-SMITH.

Revenue—Account Duty—Marriage Settlement of Widow—Children of First Marriage—Voluntary Disposition—Voluntary Settlement—Volunteers—Customs and Inland Revenue Acts, 1881 (44 & 45 *Vict. c.* 12), *s.* 38; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By s. 38 of the Customs and Inland Revenue Act, 1881, stamp duties are imposed on the personal property of deceased persons to be included in accounts directed to be delivered, including by sub-s. 2 (*a*) any property "taken under a voluntary disposition made by any person dying after June 1, 1881, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bonâ fide made three months before the death of the deceased," and including by sub-s. 2 (*c*) any property "passing under any past or future voluntary settlement," made by any person so dying, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor. By s. 11 of the Customs and Inland Revenue Act, 1889, the above-mentioned period of three months is altered to twelve months, and the expression "voluntary settlement" is made to include any trust in favour of a volunteer, whether the deed or instrument affecting the settlement was made for valuable consideration or not as between the settlor and any other person.

A widow, who was the owner of a business which she proposed to transfer to a company, married again, and by her marriage settlement it was provided that of the 19,500 fully paid-up shares which were to be the consideration for the transfer of the business, 1000 should be allotted to each of her four adult sons by her former marriage, 3200 shares should be allotted to the trustees of the settlement in trust for two infant sons and two married daughters by her former marriage, and the remaining 12,300 shares should be allotted to the trustees in trust to pay the income to the settlor for life, subject to a life annuity to her husband, and after her death in trust for those of her children by her former marriage in whose favour she should execute a power of appointment under the settlement. The company was duly registered, and the shares allotted in accordance with the provisions of the settlement. The settlor died less than five months after the execution of the settlement:—

Held, that the children of the first marriage were not to be treated as

volunteers, and that account duty was not payable upon any of the shares comprised in the settlement either as being taken under a voluntary disposition or as passing under a voluntary settlement.

INFORMATION by the Attorney General claiming account duty under 44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*a*) and (*c*), and 52 & 53 Vict. c. 7, s. 11, and estate duty under 52 & 53 Vict. c. 7, s. 5, sub-s. 2.

By a marriage settlement dated March 18, 1890, and made between Anne Smith, widow, of the first part, the defendant George Edward Jacobs-Smith of the second part, and the defendants George Edward Jacobs-Smith and Harry Pearce Gould of the third part, after reciting that Anne Smith carried on business as a corn merchant, miller, and farmer, and was absolutely entitled to the goodwill of the said businesses and to the real estate, stock-in-trade, &c., used in or connected with the same, and that the businesses and premises were of the estimated value of 195,000*l.*, and that a marriage was intended to be solemnized between Anne Smith and George Edward Jacobs-Smith, and that it had been agreed that a settlement should be made of the property of Anne Smith upon trusts in favour of herself and her intended husband and her eight children by her first marriage, and that she was desirous of converting her businesses into a limited liability company, it was agreed (inter alia) as follows: Anne Smith was, as soon as might be after the intended marriage, to procure the incorporation of a company for acquiring the businesses, the nominal capital to be 200,000*l.*, in 20,000 shares of 10*l.* each, and immediately after incorporation Anne Smith was to enter into an agreement with the company for the sale and transfer to the company of the businesses and all the assets in consideration of 19,500 fully paid-up 10*l.* shares of the company, and of the company satisfying all the debts and liabilities of Anne Smith in connection with the businesses. Of the 19,500 shares, 15,500 were to be allotted to Harry Pearce Gould and George Edward Jacobs-Smith, and 1000 each to the four adult sons of Anne Smith. Of the shares to be allotted to H. P. Gould and G. E. Jacobs-Smith, 1000 were to be appropriated as a fund to be settled upon trust for an infant son of Anne Smith, 1000 upon trust for another infant son, and 600

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shares upon trust for each of two of her married daughters and their issue. The residue of the estate allotted to the trustees, consisting of 12,300 shares, and styled "the wife's trust fund," was to be held upon trust to pay an annuity of 1000*l.* to George Edward Jacobs-Smith, and, subject thereto, the whole income was to be paid to Anne Smith for her separate use without power of anticipation; a general power of appointment was given to Anne Smith over a sum of 25,000*l.*, and a special power of appointment over the residue of the fund among her eight children. The shares allotted to the trustees as a fund for the infant sons were to be held in trust to pay the income to Anne Smith during their minority for their maintenance and education, to pay the income to the sons on their attaining twenty-one, and to transfer the settled fund to them on attaining twenty-five, the sons having a power of appointment in the event of their attaining their majority and dying under the age of twenty-five. The shares allotted to the trustees as a fund for the married daughters were to be held on trust to pay the income to each daughter for life for her separate use without power of anticipation, and after her death in trust for her children as she might appoint, and in default of appointment in trust for all her children equally.

By another indenture of even date certain property, consisting of a sum of 1000*l.* secured as therein mentioned, and certain leasehold hereditaments belonging to the intended husband, was settled upon trusts in favour of himself, the said Anne Smith, and the issue of the intended marriage as therein mentioned.

The marriage was duly solemnized. The company was incorporated on June 26, 1890, and the businesses of Anne Smith were taken over by the company. Shares were duly allotted pursuant to the agreement and settlement, 15,500 fully paid-up shares being issued to the defendants G. E. Jacobs-Smith and H. P. Gould, to be held by them upon the trusts declared by the settlement, and 1000 fully paid-up shares to each of the four sons who had attained their majority.

Anne Smith died on August 2, 1890, having by her will exercised both the general power of appointment of 25,000*l.* and

also the power of appointment in favour of her eight children given to her over the residue of the wife's trust fund.

The information claimed that account stamp duty under 44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*a*) and (*c*), and 52 & 53 Vict. c. 7, s. 11, became payable by the trustees on the value of the 15,500 shares allotted to them under the settlement (after deducting the said sum of 25,000*l.*, on which probate duty has been paid as part of Anne Smith's estate, and also the amount invested to secure the annuity of 1000*l.* during the life of George Edward Jacobs-Smith); and that account duty under 44 & 45 Vict. c. 12, s. 38, sub-s. (*a*), and 52 & 53 Vict. c. 7, s. 11, also became payable by each of the four sons who had attained their majority on the 1000 shares taken by them under the settlement; and that estate duty under 52 & 53 Vict. c. 7, s. 5, sub-s. 2, became payable by the trustees on the value of 12,300 shares, part of the said 15,500 shares (less the said sum of 25,000*l.* and the amount invested to secure the said annuity of 1000*l.* per annum). (1)

Sir R. T. Reid, A.G., and *Vaughan Hawkins*, for the Crown. Account duty on the 4000 shares given to the adult sons and the 3200 shares settled in trust for the infant sons and married daughters is payable under (2) 44 & 45 Vict. c. 12, s. 38, sub-s. 2(*a*);

(1) The claim of the Crown for estate duty was admitted.

(2) By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 1, "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof."

By sub-s. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after the 1st day of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased.

"(*c*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other

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they are immediate gifts inter vivos not made bonâ fide twelve months before the death of the deceased. Account duty on the 12,300 shares forming the wife's trust fund is payable under sub-s. 2 (*c*); they are the subject of a voluntary settlement whereby a life estate is reserved to the settlor. As between the husband and wife there was no doubt ample consideration; but there was no consideration moving between the husband and wife in favour of the children of the wife's first marriage, nor did any consideration move from the children, who did not take for valuable consideration, but as volunteers.

The Court, in determining whether a settlement is voluntary, will look at the substance of the transaction. In *Crossman* v. *Reg.* (1) a settlor transferred his shares in his business to his son conditionally on the latter executing a deed covenanting to pay him interest on the value of the shares, and the transfer of shares was held to be a voluntary settlement within the meaning of this very section. The question to be decided under this section, as was pointed out by Hawkins J. in that case, is not whether there is a sufficient consideration to support a gift under the statute of Elizabeth (2), but whether there is a gift to volunteers.

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period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, the above section is amended as follows: "The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise:

"The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the instrument, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof."

(1) 18 Q. B. D. 256.

(2) 27 Eliz. c. 4.

It is true that, in *Newstead* v. *Searles* (1), a settlement made by a widow about to re-marry upon the children of her former marriage was upheld by Lord Hardwicke against a subsequent mortgagee; but that was upon the ground that such a provision in favour of existing children was not fraudulent under the statute of Elizabeth; and in *In re Cameron and Wells* (2) Kay J. expressly declined to extend the principle to the case of a settlement by a widower in favour of his issue by a former marriage. In *Gale* v. *Gale* (3) it was expressly stated by Fry J. in his judgment that the children of the former marriage were volunteers; but a covenant to convey property for their benefit was enforced on the ground of its being an exception to the general rule that the performance of a covenant cannot be enforced by volunteers. The decision in *Newstead* v. *Searles* (1) was considered by Lord Selborne in *Mackie* v. *Herbertson* (4) and *De Mestre* v. *West* (5), and was explained as depending upon the special circumstances of that case; while in *In re Cameron and Wells* (2), Kay J. expressly said that he did not profess to understand it. The case of *Newstead* v. *Searles* (1) was in fact made an exception to the rule because of the difficulty under the circumstances of applying it. The confusion arises from the struggles of Courts of Equity to prevent the statute of Elizabeth from working injustice, for which purpose they looked at the settlement as a whole; these decisions are, however, no authority under the Customs and Inland Revenue Acts.

Jelf, *Q.C.*, and *Micklem*, for the defendants. The 4000 shares and the 3200 shares were not the subject of a donatio mortis causâ, nor of a voluntary disposition within s. 38, sub-s. 2 (*a*); nor was there a voluntary settlement of the 12,300 shares within sub-s. 2 (*c*). The section deals with volunteers, and the Crown must bring the case within the decisions relating to volunteers. There being no definition of volunteers in the Act, the same meaning must be given to the word that was given to it in Courts of Equity at the time the Act was passed. It is not a

(1) 1 Atk. 265, also in West temp. Hardwicke. A consolidated report will be found in a note to *Mackie* v. *Herbertson*, 9 App. Cas. at p. 320.

(2) 37 Ch. D. 32.

(3) 6 Ch. D. 144.

(4) 9 App. Cas. 303.

(5) [1891] A. C. 264.

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true view of the case that all are volunteers who do not give any consideration, for this would include the children of the marriage, who clearly are not volunteers in the ordinary sense, for they can enforce the provisions in their favour made in a marriage settlement. There being an absolute exception in favour of the children of the marriage, it was extended by Lord Hardwicke, in *Newstead* v. *Searles* (1), to the wife's children by a former marriage, who, whether that decision depends on principle or not, are not to be considered as volunteers. *Clarke* v. *Wright* (2), which was a decision of the Exchequer Chamber, followed *Newstead* v. *Searles* (1); and so did Fry J. in *Gale* v. *Gale.* (3) *Newstead* v. *Searles* (1) cannot be treated as overruled by extra-judicial utterances in recent decisions, one of which, *De Mestre* v. *West* (4), is plainly distinguishable as being an attempt to enlarge the doctrine, not only in favour of the illegitimate son of a woman about to marry, but also in favour of the issue of the illegitimate son who were unborn at the date of the settlement. The case of *Crossman* v. *Reg.* (5), cited for the Crown, was a plain case of evasion, and is not in point. [They also cited *Green* v. *Paterson* (6); *Parkes* v. *White* (7); *Ithell* v. *Beane* (8); *In re D'Angibau.* (9)]

Sir R. T. Reid, A.G., in reply. With regard to clause (*a*), a voluntary disposition is not the same as a voluntary settlement; there may be, and it is contended that in the present case there is, a voluntary disposition in a settlement for value. As to the claim under clause (*c*), the provisions of s. 11 of the Customs and Inland Revenue Act, 1889, shew that it is not merely property under a voluntary settlement which is to pay duty, but also property comprised in a settlement for valuable consideration if settled in favour of a volunteer.

WRIGHT J. In this case the liability to payment of estate duty being admitted, we have only to concern ourselves with the question of account duty. That question arises, in the first

(1) 1 Atk. 265; 9 App. Cas. 320, n.
(2) 6 H. & N. 849.
(3) 6 Ch. D. 144.
(4) [1891] A. C. 264.
(5) 18 Q. B. D. 256.
(6) 32 Ch. D. 95.
(7) 11 Ves. 209.
(8) 1 Ves. Sen. 215.
(9) 15 Ch. D. 228.

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place, on the two items of 4000 shares and 3200 shares. In respect of this the marriage settlement did not, in my judgment, purport to operate as "an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise," because it was, as I read it, a mere ordinary settlement giving a life estate to the intended wife and, in the events which have happened, to particular persons. I do not think that it falls within 44 & 45 Vict. c. 12, s. 38 (*a*); nor does it appear to me to be brought within that provision by s. 11 of the Customs and Inland Revenue Act, 1889, because that section seems to apply only where the trust is such that, in the ordinary course of things, possession might have been taken under the settlement when it was made.

Then, as to the account duty on the 12,300 shares, after deducting the 25,000*l.* which it is agreed ought to be deducted, I should have said, apart from authority, that no valuable consideration had been given by the cestui que trusts in question, although it must be conceded that in the case of *Gale* v. *Gale* (1), and at least one of the cases there cited by Fry J., language is used which seems to go the length of saying that even as between these parties and the settlor valuable consideration might be considered to be given. However that may be, I think that we are bound by the cases from *Newstead* v. *Searles* (2) downward, which shew that, although cestui que trusts under settlements of this nature may not take for valuable consideration, they are, nevertheless, protected against subsequent purchasers as if they had been parties to the marriage consideration, and therefore, for the greatest and most important of the purposes of a settlement of this kind, they are treated as not being volunteers. There is no doubt much in the judgment of the Privy Council in *De Mestre* v. *West* (3), and something also in that of Lord Selborne in *Mackie* v. *Herbertson* (4), tending to shew that the decision in *Newstead* v. *Searles* (2) is to be supported on special grounds. I am by no means sure that the same special grounds do not arise in this case, because some money or property valued at 1000*l.* was brought into settlement by the

(1) 6 Ch. D. 144.
(2) 1 Atk. 265; 9 App. Cas. 320, n.
(3) [1891] A. C. 264.
(4) 9 App. Cas. 303.

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husband; but, apart from that, I think that we are bound by the course of decisions, whatever criticisms may have been made in some of the later cases as to the grounds on which those decisions were based. To my mind, common sense requires, unless there is something contrary to the language of the statute, that the same construction should be applied to the word "volunteer" in this statute as has been applied to it in relation to the only other purposes as to which any legal meaning or effect has been given to that word; and, as I have said, in relation to other matters, effect has been given to that word in such a sense as to make children of the former marriage not within the ordinary rule as to volunteers. I cannot help thinking that a provision for the children of a former marriage is often a proper, and sometimes a necessary, part of a settlement on a second marriage. A lady who marries a second time certainly alters very materially the possibilities of succession on the part of the children of her former marriage; she makes it, in every common sense view also, much less likely that they will receive the benefits which they might have received if she had never married a second time. In the absence of any facts found in this case to shew that there is anything in the nature of an attempted evasion of the law, which of course would be an entirely different matter, I think we ought not to hold that such a reasonable part of the marriage settlement would be within the provisions of the Act at all. Of course, this decision would not apply to any class of beneficiaries who are not within the application of the rule laid down in *Newstead* v. *Searles* (1); it would not apply to any class of beneficiaries who had not been brought in the year 1889, or who have not since been brought by decisions, within the scope of the marriage consideration. I think, therefore, that as regards both parts of this case in relation to the account duty the prayer of the Crown fails.

COLLINS J. I am of the same opinion. The argument for the Crown, as I understand it, is that the particular trusts which are here included are mainly in favour of persons who, giving no valuable consideration themselves, must be deemed to be

(1) 1 Atk. 265; 9 App. Cas. 320, n.

volunteers; and the Attorney General, while admitting that the instrument in which these provisions are contained cannot itself be described as a voluntary settlement, contends that the particular disposition in favour of these individuals can be isolated from the rest of the settlement, and, inasmuch as they have given no consideration, it must as against them be deemed to be, and brought into the account as, a voluntary settlement.

Now, I think that when you are construing the word "volunteer" in s. 11, sub-s. 3, of the Act of 1889, you must look to the meaning which that word, as a term of art, bore in Courts of Equity when dealing with a subject-matter similar to that now in question, and it seems to me that the Courts of Equity did, at that time, regard the offspring of the former marriage as not coming within the category of volunteers. I think that the case of *Newstead* v. *Searles* (1), decided by Lord Hardwicke, and commented upon in several of the more recent cases, *Gale* v. *Gale* (2) amongst them, shews that the wife's children by her former marriage do not come within that category. Now, in both the cases I have named, and first in *Newstead* v. *Searles* (1), there was an application on the part of the wife's children by her former marriage to have the trusts contained in the settlement between her and her future husband executed in their favour; they applied not only for this purpose, but also in order to avoid any subsequent trusts which, under the statute of Elizabeth, would have defeated the trust in their favour had they been volunteers. Now, if they had been volunteers, they would not have been in a position to demand the assistance of a Court of Equity: that is thoroughly well established; and, therefore, the first point, namely, whether they were entitled to the relief claimed (that is, to specific performance of the settlement trusts in their favour), could not be decided without deciding whether they were volunteers or not; that point was decided in their favour by Lord Hardwicke, whose judgment involved the decision that they were not volunteers. He then decided the other question, whether or not they had lost their right by reason of the subsequent conveyance for value to a purchaser. In considering that

(1) 1 Atk. 265; 9 App. Cas. 320, n. (2) 6 Ch. D. 144.

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question he had to decide whether or not they came within the exception of purchasers for value, and whether the exception took them out of the statute of Elizabeth; he decided that point also in their favour; and therefore it seems to me that on both points he was of opinion that they did not come within the category of volunteers. That case is dealt with by Fry J. in *Gale* v. *Gale* (1), and in dealing with it he refers to a series of other decisions to the same effect, one of them, *Clarke* v. *Wright* (2), being a decision of the Exchequer Chamber, and he points out, as I have now pointed out, that in *Newstead* v. *Searles* (3) Lord Hardwicke did decide those two points; and having reviewed that authority, and also the authority of *Clarke* v. *Wright* (2), he comes to the conclusion that the children of the wife by the former marriage could enforce provisions in a settlement in their favour.

Now that, of course, does not deal with the point under the statute of Elizabeth; but Fry J. lays down, as it has been laid down repeatedly in a number of cases, that a mere volunteer cannot come to a Court of Equity and ask it to enforce a voluntary disposition in his favour. He repeats that, and comes to the conclusion that the children in that case were in a position to enforce such a provision. That seems to me to involve a direct decision that in his judgment they were not volunteers. He explains that such persons are deemed to come within the marriage consideration, and if you get them within that consideration, although the rule that brought them in may appear to be an arbitrary rule and incapable of being rested upon any very well-defined principle, it is tantamount to saying that they are not volunteers; they are within the consideration—they are persons deemed to be giving consideration, and therefore they are not volunteers. Therefore, it seems to me clear that at the time when this statute was passed persons in the position of the wife's children here were not persons who could have been described as volunteers, or who could have been defeated if they had sought to enforce the trusts for their benefit in a settlement by means of an application to a Court of Equity.

(1) 6 Ch. D. 144. (2) 6 H. & N. 849.
(3) 1 Atk. 265; 9 App. Cas. 320, n.

That being so, did this Act intend to cut at the rights of such persons or not? It seems to me that in using the term "volunteer" without giving any definition of it the Legislature must be taken simply to have been dealing with the class of persons who, having regard to the decisions of Courts of Equity, would at the time have been deemed volunteers. For the reasons I have pointed out I do not think that these persons were volunteers.

I have pointed out that the decision in *Newstead* v. *Searles* (1) was a decision of the Lord Chancellor—that that was followed by a decision of the Exchequer Chamber, and also by Fry J. Under those circumstances it would be impossible for us in any way to refuse to follow that case: nothing short of a decision of the House of Lords would destroy its authority. No doubt certain dicta of Lord Selborne in *De Mestre* v. *West* (2) in the Privy Council have been cited to us; but, as far as we are concerned, they are dicta only: though entitled to the greatest weight and the greatest possible respect, they do not affect the authority of the previous decisions. The other authorities cited to us were also dicta in a Scottish appeal to the House of Lords, which would be no binding authority upon us, for the English decisions are not binding in the Scottish Court of Session, and were only prayed in aid in that case by Lord Selborne as founding some analogy; in that decision he has placed an interpretation upon *Newstead* v. *Searles* (1) which was not the view adopted of it in the Court of Exchequer Chamber when following it. And again, with the most profound respect for anything coming from Lord Selborne on such a subject, I feel that I am not at liberty to act upon his opinion, even if I were prepared to follow it. The matter seems to depend on the authority of *Newstead* v. *Searles* (1), *Clarke* v. *Wright* (3), and *Gale* v. *Gale*. (4) I think, therefore, that the case of the Crown fails.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the defendants: *Tarry & Sherlock, for Blyth, Norwich.*

(1) 1 Atk. 265; 9 App. Cas. 320, n.
(2) [1891] A. C. 264.
(3) 6 H. & N. 849.
(4) 6 Ch. D. 144.

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JONES *v.* COMMISSIONERS OF INLAND REVENUE. SWEETMEAT AUTOMATIC DELIVERY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Agreement in Consideration of Fixed Quarterly Payments —Duty on—"Bond, Covenant, or Instrument"—"Lease or Tack"—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *Sched.*

By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period, with a duty of 2*s.* 6*d.* for every 5*l.* of the annuity or sum periodically payable.

By an agreement under seal between a theatrical ticket agent and a telephone company for the supply of the means of telephonic communication between the ticket agent's head office and branch offices and other places, the company undertook to erect and maintain in working order the telephonic lines and apparatus, and the ticket agent covenanted to pay by quarterly instalments in advance to the company for the use of the lines and apparatus and for the telephonic communication an annual sum per line, the minimum amount payable to be calculated on the rent of forty-five lines. The agreement was to continue for ten years, and thereafter from year to year, determinable by either party giving three months' notice in writing, power being reserved to the company to determine it at any time in certain events.

By an agreement under seal between a railway company and an automatic machine company, the former agreed to permit the latter to place automatic machines on the platforms of certain of their stations, the machines to be placed and, until otherwise directed, kept in the positions directed by the railway company; the automatic machine company to pay to the railway company a yearly rent by equal quarterly payments on the usual quarter days. The agreement contained a provision enabling either party to determine it by three months' written notice expiring at any time:—

Held, in each case, that the agreement did not come within the exception in favour of a "lease or tack," but was chargeable with an ad valorem duty under the head "bond, covenant, or instrument of any kind whatsoever," as being the only, principal, or primary security for an annuity, or for a sum of money at stated periods, for an indefinite period.

Cases stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

The instrument chargeable with duty was an agreement under seal for the supply of telephonic communication, dated July 1, 1894, and made between the National Telephone Company, Limited, of the one part, and the appellant, carrying on business as Keith, Prowse & Co., of the other part. It contained recitals that the appellant was desirous of establishing telephonic communication from her head office, No. 48, Cheapside, to her London branches and to various theatres, hotels, and other places set out in the first schedule, such telephonic communication being by means of metallic circuits and including telephone instruments at the head office, and that the company had agreed to supply the means of such telephonic communication and to maintain the same upon the terms and conditions provided by the agreement.

By clause 1 the company undertook to erect and maintain in good working order the telephonic lines and apparatus. By clause 2 the appellant covenanted to pay by quarterly instalments in advance to the company for the use of the telephonic lines and apparatus and for the telephonic communication the annual sum of 11*l.* 5*s.* per line, the minimum amount to be payable being calculated on the rent of forty-five lines, that is, 506*l.* 5*s.* per annum. By clause 3 the agreement was to continue for a term of ten years, and thereafter from year to year, determinable by either party giving to the other not less than three months' previous notice in writing, expiring at the end of the tenth or any subsequent year. By clause 11 power was given to the company to determine the agreement, if the quarterly payments thereunder should at any time be in arrear for one calendar month, without prejudice to their right to recover such arrears, and the company was entitled in such case to recover as liquidated damages and not by way of penalty a sum equal to the whole sum which would have become payable between such determination and the expiration of the agreement, up to, but not exceeding, a maximum of 2000*l.* By clause 16 provision was made for connecting other places with the appellant's head office at the rate thereinbefore mentioned, the description of such connection to be inserted in the second schedule thereto.

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The Commissioners (whose opinion was required under s. 12 of the Stamp Act, 1891) were of opinion that the instrument was the only or principal or primary security for the sum of 506*l.* 5*s.* payable annually for an indefinite period by quarterly payments, that such sum was neither interest for any principal sum secured by a duly stamped instrument nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, with the duty of 12*l.* 15*s.*, being the ad valorem duty of 2*s.* 6*d.* for every 5*l.* and any fractional part of 5*l.* of the 506*l.* 5*s.*, the sum annually payable by the appellant to the company, and with the duty of 10*s.* in respect of the uncertain sums payable or which might become payable over and above the 506*l.* 5*s.* per annum, and they assessed the duty thereon accordingly, but stated this case at the request of the appellant.

The questions for the opinion of the Court were:—

(1.) Whether the instrument was chargeable with the duties of 12*l.* 15*s.* and 10*s.* in accordance with the assessment of the Commissioners;

(2.) If not, with what duty it was chargeable.

Gore Browne, for the appellant. The document does not come within the clause "bond, covenant, or instrument"; if it does, it also comes within the exception in favour of a lease or tack. The expression "lease or tack" as used in the Stamp Act, 1891, is not limited to a lease of hereditaments: this is apparent from the clause headed "lease or tack," which, after dealing with leases of "lands, tenements, or heritable subjects," provides by sub-s. 4 a duty of 10*s.* on leases "of any other kind whatsoever not hereinbefore described." There is here a lease of chattels, the telephonic receivers and transmitters, and also a lease of an easement to use the company's wires, which are tenements occupied by them, and in respect of which they are rateable; there is an easement within the principle enunciated by Kay L.J. in *Mayor of Southport* v. *Ormskirk Assessment Committee.* (1)

[WRIGHT J. There is nothing to shew that the appellant had the exclusive use of the private wires.]

(1) [1894] 1 Q. B. 196, at p. 201.

Exclusive use is unnecessary; there might still be an easement capable of demise. An easement may be demised: Woodfall on Landlord and Tenant, c. 3; Platt on Leases, pt. 2; *Newmarch* v. *Brandling* (1); *Osborn* v. *Wise*. (2)

[WRIGHT J. The language of s. 75 of the Stamp Act seems to shew that the legislature were dealing only with leases of lands, tenements, or heritable subjects.]

The document contains all the essentials of a lease: it provides for the commencement of the term, for power to determine it, and contains a covenant for the surrender to the lessor at the end of the term of the chattels comprised in it. It does not fall within the clause headed "bond, covenant, or other instrument." Some limitation must be placed on the literal meaning of "covenant," which would strictly cover every case where money was to be paid by more than one instalment. The case comes within the decision in *Mounsey* v. *Stephenson* (3), where an agreement by which one party covenanted to pay the other a fixed salary, and the other covenanted not to set up a chemist's shop within a certain distance, was held not to be an instrument for the payment of an annuity, nor for the payment of any sum of money, and to be sufficiently stamped as a "bond not otherwise charged." The document is not a "security," for its principal object was, not to secure the payment of an annuity or of sums of money at stated periods, but to obtain for the appellant the means of telephonic communication.

Danckwerts, (*Sir F. Lockwood, S.G.*, with him), for the Crown. The kind of lease or tack contemplated by the Stamp Act is one of corporeal hereditaments; there is nothing in ss. 75–78, which deal with leases, to suggest any intention to include chattels. A lease of chattels is in fact a hiring of them, and if the appellant's contention is right every hiring agreement is liable to stamp duty.

The document comes within the clause "bond, covenant, or other instrument," in which the word "annuity" is obviously used in a popular sense. The agreement is not for ten years certain, for the company have power to determine it at any

(1) 3 Swanst. 99. (2) 7 C. & P. 761.
(3) 7 B. & C. 403.

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time on non-payment of the quarterly payments; it is for an indefinite time, and is therefore chargeable with duty at 2*s.* 6*d.* for every 5*l.* *Mounsey* v. *Stephenson* (1) is not in point; that action was not brought to recover the annuity, but for the penalty, and the document was sufficiently stamped for that purpose, it being clear law that where an instrument is capable of being viewed in different aspects, in one of which it is liable to stamp duty at one rate, and in the other at a different rate, it may be received in evidence, where it is relied upon in the aspect in which it is properly stamped: *Adams* v. *Morgan* (2), where *Buck* v. *Robson* (3), *Brice* v. *Bannister* (4), and *Fisher* v. *Calvert* (5) are discussed. The present case is really concluded by the decision in *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue.* (6)

Gore Browne, in reply.

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By an agreement under seal of May 28, 1894, made between the Great Western Railway Company of the one part, and the appellants of the other part, it was agreed as follows.

By clause 1 the railway company agreed during the continuance of the agreement to permit the appellants to place and maintain, first, at stations (not in any case exceeding 300 stations) on the Great Western Railway from time to time agreed upon between the railway company and the appellants, a sweetmeat automatic delivery machine or sweetmeat automatic delivery machines, with columns for cigarettes and matches at such stations as had not for the time being any accommodation provided for refreshments, and secondly, at stations (not exceeding in any case 150 stations) on the Great Western Railway from time to time agreed upon between the railway company and the appellants, an automatic weighing machine or automatic weighing machines (not in any case exceeding the total of 175 machines). By clause 2 the appellants undertook to pay to the

(1) 7 B. & C. 403.
(2) 12 L. R. Ir. 1.
(3) 3 Q. B. D. 686.
(4) 3 Q. B. D. 569.
(5) 27 W. R. 301.
(6) Law Rep. 7 Ex. 211.

railway company in respect of the privileges thereby granted the clear yearly rent of 3000*l.*, to be paid in advance by equal quarterly payments on the four usual quarter-days, the first payment to be made on March 25, 1894, on which day the agreement was to come into force. Clause 12 contained a provision enabling either the railway company or the appellants to determine the agreement by giving to the other three calendar months' notice in writing expiring at any time.

The Commissioners (whose opinion was required under s. 12 of the Stamp Act, 1891) were of opinion that the instrument was the only or principal or primary security for the sum of 3000*l.* payable annually for an indefinite period by four equal quarterly payments, that such sum was neither interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "bond, covenant, or instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, with the duty of 75*l.*, being the ad valorem duty of 2*s.* 6*d.* for every 5*l.* of the 3000*l.*, the sum periodically payable by the appellants to the railway company; and they assessed the duty thereon accordingly, but stated this case at the request of the appellants.

The questions for the opinion of the Court were:—

(1.) Whether the instrument was chargeable with the duty of 75*l.* in accordance with the assessment of the Commissioners.

(2.) If not, with what duty it was chargeable.

R. V. Bankes, (*J. E. Bankes*, with him), for the appellants. The instrument is a lease; it created a tenancy and conferred a right to exclusive occupation within the principle of the decision in *Taylor* v. *Overseers of Pendleton*. (1)

[THE COURT:—By the agreement the railway company had power to direct on what part of their platforms the machines should be placed until otherwise directed; there could be no exclusive occupation; and on this point the case falls within *Smith* v. *Lambeth Assessment Committee*. (2)]

At all events, the instrument is not a "bond, covenant, or

(1) 19 Q. B. D. 288. (2) 10 Q. B. D. 327.

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instrument of any kind whatsoever," but is only liable to a duty of 10*s.* as a "deed of any kind whatsoever, not described in this schedule." If it confers only a licence it comes within the principle of *Thames Conservators* v. *Commissioners of Inland Revenue* (1), where a revocable agreement not under seal to grant permission for the erection of a jetty was held to be chargeable with stamp duty only as an agreement; in the present case the agreement, being under seal, would be liable to the ordinary deed stamp of 10*s.*

Sir F. Lockwood, S.G., and *Danckwerts*, for the Crown. The case of *Thames Conservators* v. *Commissioners of Inland Revenue* (1) is distinguishable; that decision depended on the terms of a special Act, under which the instrument was held to be a licence. In the present case there is an ordinary covenant for the payment of money at stated periods, which falls within the clause "bond, covenant, or instrument" in the schedule to the Stamp Act, 1891, as being "the only or principal or primary security for any sum or sums of money at stated periods." The case is governed by the decision in *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue.* (2)

Bankes, in reply.

WRIGHT J. I am of opinion that the contention of the appellant Jones cannot be sustained. The question for our decision arises upon a document by which the telephone company agree with a firm of musical agents to put them into communication by telephone between their (the musical agents') head office on the one hand, and a number of branch offices on the other hand. In that agreement, which is under seal, the musical agents are called the lessees, but there does not seem anything else in the document which purports to treat it expressly as a lease. The substance of the agreement is that the company are to lay down the means of telephonic communication and to maintain it, and to receive from the lessees a sum of 11*l.* 5*s.* for every line laid, with a minimum of 506*l.* per annum, and the agreement is to last for ten years certain, unless determined before then on certain events which are mentioned in the agree-

(1) 18 Q. B. D. 279. (2) Law Rep. 7 Ex. 211.

ment; and after the term of ten years it is to go on from year to year, subject to either party giving a specified length of notice to determine it. I think there is no other material provision in the agreement. Being an agreement under seal, and containing an agreement to pay this minimum sum, whatever more it may be, it appears to me that it is, at any rate, a covenant by the lessees to pay that sum at the stated periods mentioned in the agreement.

Then the question is, what is the effect of the Stamp Act upon it? It appears to me that if, instead of being a covenant to pay by instalments the total amount of 5000*l.* over ten years, it had been a covenant to pay 5000*l.*, it would have been within that part of the schedule which is found under the heading "Mortgage, Bond, Debenture, Covenant," and it would have been a covenant "being the only or principal or primary security for the payment or repayment of money." That that would have been the opinion of the Court which decided the case of *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (1) is clearly to be inferred from their judgment. But then it is not in the present instance a covenant for the payment of that capital sum, but a covenant for the payment by quarterly payments of about 500*l.* in each year. Therefore it does not fall directly within the mortgage clause which I have referred to.

Then there is a clause in the schedule headed "Bond, Covenant, or Instrument," which appears to deal expressly with cases which would be within the mortgage clause if the sum payable were to be paid in one amount, but are not within it because the sum payable is to be paid in a number of instalments at stated periods. This "bond, covenant, or instrument" clause in the schedule appears to lay down a rule for the valuation of such instruments; and the rule seems to be that, if the instalments are payable for a certain and definite period so that the total amount ultimately payable can be ascertained, one is referred back to the mortgage clause for the amount of the duty. If the payments are to extend over an indefinite period, then for some reason or other the legislature has chosen to assume that

(1) Law Rep. 7 Ex. 211.

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the duration of that period will be twenty years, and the duty is 2*s.* 6*d.* on every 5*l.* I think that primâ facie this document requires to be stamped under that provision, as the Commissioners have in fact required it to be stamped. The case of *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (1) is, I think, an authority that the word "security" in the "bond" clause is to be construed in the same way as "security" under the "mortgage" clause; I do not see how the Court could have arrived at the conclusion at which they did arrive unless that had been their view. It seems to me that we are bound by that decision; but even if we are not bound by it, it appears to me that it puts the proper construction on the schedule, and that the word "security" as used in these schedules does not mean as in popular language some obligation which is auxiliary to some other obligation, but means any obligation created by any instrument.

If that is so, the only other point open to the appellant is that this is a case of rent reserved by a "lease or tack," in which case the duty will be much lower. I cannot assent to that suggestion; I think that this instrument is really not like a lease at all. There is nothing to shew even that any exclusive possession of the wires is intended to be given; but assuming there is, the provision as to the payments to be made is not to my mind like a provision for rent properly so called. As regards the agreement itself, it appears to me that the payment is a payment to be made not merely for the occupation either of the wires or of the instruments, but also for services to be rendered by the company and expenses to be paid for by them, first, in laying down the lines; secondly, in maintaining them; thirdly, for the use of the company's patents and things of that kind; and it would be a misnomer to say that that was rent intended to be reserved by a lease at all. Also, I think that the schedules and provisions of the Stamp Act referring to a lease or tack, if fairly read, and read in connection with the sections of the Act, ought to be considered as referring to leases or tacks of the usual kind, that is to say, of land and tenements in the usual sense. For these reasons I think that our judgment must be for the Crown.

As to the case of the Sweetmeat Automatic Delivery Company,

(1) Law Rep. 7 Ex. 211.

I am of opinion that the document was not properly a lease at all, and that on that point we are bound by authority; in fact, so much was conceded by the appellants' counsel. Then, with regard to the question of the document being a "security," the case is determined by the same, or by some of the same, considerations which have determined our decision in the last case. I think that the instrument is a security for the payment of money for an indefinite time, the only difference between the two cases being that in this case the amount can be calculated apart from the indefiniteness of the time; it is a fixed amount, so that there is no difficulty in the case at all. There must be in this case also judgment for the Crown.

COLLINS J. I am of the same opinion in both cases. Both the points made during the arguments are common to both cases; but there is more colour in Jones's case for suggesting that there was a lease. It was contended that, taking the provisions in the agreement together, there was a lease of the thing demised—that is, the instruments—and also a lease of the right to use certain wires, which wires were also demised. On carefully considering the provisions of the statute which we have to construe, it seems to me that by the words "lease or tack" the legislature meant to deal only with leases or tacks of land, or, at all events, of hereditaments. I do not think that, fairly construed, when we look at the sections of the Act dealing with the same subject-matter, beginning with s. 75 and going down to s. 78, it can be suggested that the legislature had in its mind anything except a lease in the proper sense of the term—a lease dealing with lands, tenements, or heritable subjects. A number of instances of leases are dealt with specifically in these sections, and none of them deal with anything except those subject-matters. Whether one can speak technically and strictly of a lease of chattels or not, I do not think that in this statute a lease of chattels is contemplated, or that rent reserved by a lease or tack of chattels can be said to embrace such an annual payment as is agreed to be paid for the hire of these chattels in this case.

That throws us back upon the other point, upon which I was certainly much pressed by the argument for the appellants, and

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also by the authority of *Taylor* v. *Overseers of Pendleton* (1); but now that the decision in the *Limmer Asphalte Co.'s Case* (2) has been explained, it seems to me that it covers the whole point in the present case on the question of the document being a "bond, covenant, or instrument, being the only or principal or primary security for any annuity or for any sum or sums of money at stated periods." The use of the word "security," no doubt, gives rise to an argument upon which the decision in *Taylor* v. *Overseers of Pendleton* (1) was founded, and I was a good deal pressed as to whether that did not really refer to something in its nature collateral—something that secured a right already acquired under some other instrument or power. But when we look at the provisions with regard to the duty on an instrument for a definite and certain period, we find that it is the same ad valorem duty as on a bond or covenant for such total amount. That throws us on to the clause headed "Mortgage, Bond, Debenture, Covenant," and we there find that the same ad valorem duty is charged—in fact, that that is made the standard to ascertain what duty is chargeable upon a "bond, covenant, or instrument, being the only or principal or primary security, &c." That at once shews that the word "security" in those two clauses must have the same meaning. Now, in "mortgage, bond, debenture, covenant," it is clear that the statute is dealing with what we may call a primary security—with the instrument which creates the obligation as well as gives the right to recover the consideration; and therefore in that part of the Act it clearly does not appear to be used in any collateral or auxiliary sense.

Referring back to the provision as to "bond, covenant, or instrument of any kind whatsoever," I think the very exception in that clause itself emphasizes that argument, because it begins by dealing with an instrument "being the only or principal or primary security for any annuity"; and then, in the case of an annuity, it excepts out of it the instrument originally creating the annuity, thereby indicating that, but for that exception, it would have been embraced within the provisions dealing with the "principal or primary security for any annuity"—that is to say, that the instrument creating the annuity would, but for the

(1) 19 Q. B. D. 288. (2) Law Rep. 7 Ex. 211.

exception, be such a security as is dealt with in the section. Then, having excepted the instrument creating the annuity only, the clause goes on to deal with instruments being the principal or primary security for any sum or sums of money at stated periods. That clearly must include the instrument which creates the obligation to pay those sums, not merely the instrument which provides a collateral security for their payment. It seems to me, therefore, that, taking these clauses together, it is clear that the instrument creating the obligation may be a security within the meaning of that part of the Act. If that be so, it seems to me that the foundation of the judgment in *Taylor* v. *Overseers of Pendleton* (1), so far as it applies to the present case, is gone. In that case the instrument was not under seal, and our attention has been called to the fact that it is not essential that under the word "instrument" it should be under seal. I cannot tell how far that may have weighed with the Court in that case; at all events, it seems to me that the authority of the *Limmer Asphalte Co.'s Case* (2) is distinctly in point on this particular matter. It is clear that the duty imposed in that case was an ad valorem duty which would be reserved under "mortgage, bond, debenture, covenant," and that the only difference between that case and the present is this, that there the sum of 6000*l.* payable at stated intervals was a fixed sum, and therefore capable of being ascertained, the duty upon it being capable of assessment once for all; while here we are dealing with a payment which cannot be ascertained in the same way, because the period is indefinite, and which, therefore, comes within the provision "for the term of life or any other indefinite period." Here we have a term of ten years, subject, no doubt, to determination, but still a period of ten years, with a right, and apparently an expectation, that that term will be extended by an interest from year to year after its expiration. That makes the term, it seems to me, indefinite, and therefore lets in the scale of assessment which the Commissioners have adopted.

The Sweetmeat Automatic Delivery Company's case raised the same two points. There can be, however, no question whatever arising upon the words "lease or tack"; there was nothing

(1) 19 Q. B. D. 288. (2) Law Rep. 7 Ex. 211.

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in the nature of a demise; that is clear from *Smith* v. *Lambeth Assessment Committee*. (1) The argument upon the point that "bond, covenant, or instrument" means an instrument of a collateral or auxiliary kind, I have already dealt with in the other case. Both appeals must, therefore, be dismissed.

WRIGHT J. I may add that there is one other reason why the agreement in Jones's case is not for a term certain; provision is made for determining it in certain events, either wholly or partially, before the end of the ten years.

Appeals dismissed.

Solicitors for the appellant Jones: *Reyroux, Phillips, & Golding.*

Solicitors for the appellants, the Sweetmeat Automatic Delivery Company: *Stephens & Stephens.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. J. B.

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Nov. 23.

ATTORNEY GENERAL *v.* LOYD AND OTHERS.

Revenue—Probate and Estate Duties—Legatees identified by Reference to Will of another Testator—Whether Duties under both Wills must be Paid—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5.

A testator bequeathed his personal estate to his brother, and in case of his death in the testator's lifetime directed that it should go and be paid to his brother's executors or administrators as part of his personal estate as if his brother had survived him and died immediately after him. The testator's brother predeceased the testator, leaving a will under which he appointed executors.

The Crown having claimed, in addition to the probate and estate duties paid by the testator's executors, a second probate duty and estate duty from the executors of his brother's will:—

Held, that the brother's executors were not chargeable with the duties claimed.

Lord Advocate v. *Bogie* ([1894] A. C. 83) followed.

Perry's Executors v. *Reg.* (Law Rep. 4 Ex. 27) distinguished.

INFORMATION by the Attorney General claiming probate duty under the Customs and Inland Revenue Act, 1881, and estate

(1) 10 Q. B. D. 327.

duty under s. 5 of the Customs and Inland Revenue Act, 1889.

Lewis Loyd by his will, dated November 5, 1885, bequeathed to the trustees of his will the sum of 150,000*l.* upon trust to pay the income thereof to his wife for life, and after her death to pay thereout legacies of various amounts; and the testator, after bequeathing certain annuities, disposed of his residuary personal estate in the following terms:—

"All my personal estate not specifically bequeathed or disposed of by this my will or any codicil hereto, and not being leasehold hereditaments, which shall remain after payment of my funeral and testamentary expenses and debts and of the pecuniary legacies bequeathed by this my will or any codicil hereto (including the aforesaid legacy of 150,000*l.*) and of the payment of all legacy duty hereinbefore or hereinafter directed to be paid other than the duty on the legacies hereinafter directed to be raised and paid out of the aforesaid sum of 150,000*l.* and subject to the aforesaid provision for payment of the annuities hereinbefore bequeathed I give to my brother Edward Loyd absolutely but in case he shall die in my lifetime then I direct that the same shall go and be paid to his executors or administrators as part of his personal estate as if my said brother had survived me and had died immediately after me and the receipt of such executors or administrators shall be an effectual discharge for the same."

Lewis Loyd died on July 19, 1891, and his will was duly proved on August 24, 1891. Edward Loyd died on December 21, 1890, in the lifetime of Lewis Loyd, the testator. By his will, dated December 13, 1888, Edward Loyd bequeathed the whole of his personal estate for the benefit of his widow and children or issue, and appointed the defendants his executrix and executors. His personal estate was sworn to be of the value of 139,651*l.* 17*s.* 6*d.*, and probate duty under 44 & 45 Vict. c. 12, and estate duty under 52 & 53 Vict. c. 7, were paid thereon.

The residuary account of Lewis Loyd's estate was passed in July, 1892, when legacy duty was assessed and paid by his executors at the rate of 3 per cent. on 90,048*l.* 4*s.*, the amount of the net residue appearing by the account to be then payable to

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the executors of Edward Loyd's will, and the sum of 90,048*l.* 4*s.* (less duty at 3 per cent.) was paid by the trustees of Lewis Loyd's will to the defendants as executrix and executors of Edward Loyd, and the sum so paid was dealt with by the defendants as part of Edward Loyd's personal estate.

The informant prayed that it might be declared that the said sum of 90,048*l.* 4*s.* (less the legacy duty thereon paid under Lewis Loyd's will) received by the defendants as executrix and executors of Edward Loyd's will from the trustees of Lewis Loyd's will, under the bequest in the last-mentioned will, was liable under the Customs and Inland Revenue Act, 1881, to duty as part of the estate and effects in respect whereof probate of Edward Loyd's will had been granted to the defendants, and was also liable to estate duty under s. 5 of the Customs and Inland Revenue Act, 1889, as part of the same estate.

Sir R. T. Reid, A.G., and *Vaughan Hawkins*, for the Crown. Account and estate duty are properly payable by the executors of Edward Loyd. The case is distinguishable from *Lord Advocate* v. *Bogie* (1), upon which the defendants will rely. In that case there was a bequest of the residuary estate to certain named persons, "and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees"; and it was held that duty was not payable by the executors of a residuary legatee who predeceased the testator, because the property was not the personal estate and effects of the deceased residuary legatee within the meaning of the statutes. In the present case the language of the will is very different, there being an express direction that in the event of Edward Loyd dying first the property was to be paid his executors as part of his personal estate as if he had survived the testator, and by virtue of this direction the property became part of the personal estate of Edward Loyd. It is clear that cases may arise in which a second duty is chargeable owing to the death of the original legatee in the testator's lifetime, for in *Perry's Executors* v. *Reg.* (2) it was held that, where a testator

(1) [1894] A. C. 83. (2) Law Rep. 4 Ex. 27.

had bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue, the son's executors were chargeable with probate duty on the amount of the bequest in the same manner as they would have been had the son actually survived the father.

[WRIGHT J. That case is distinguishable. It depended on s. 33 of the Wills Act, but for the operation of which the legacy would have lapsed. The statute placed the son in exactly the same position as if he had survived his father, and the son's executors could only recover the money left by the father on the assumption that the son was the survivor, in which event probate duty would clearly have been payable by them.]

The present case falls within the case suggested by Lord Watson in *Lord Advocate* v. *Bogie* (1), for the testator has in his will indicated that his bequest is to be in the same position as if it had in point of fact belonged to his brother who predeceased him. The Crown is entitled to these duties as a legatee or a cestui que trust.

Sir H. James, Q.C. (*R. M. Bray*, with him), for the defendants. The case of *Perry's Executors* v. *Reg.* (2) is not in point; it is distinguishable on the ground already suggested by the Court. The decision in *Lord Advocate* v. *Bogie* (3) is conclusive. In that case it was held that the property went to the deceased legatee's executors to be administered by them under the trusts of the will, and the present will has precisely the same effect; the direction that the property is to go to Edward Loyd's executors as part of his personal estate means no more than that it is to be administered under the trusts of the will. It was impossible for Lewis Loyd by his will to make this property the property of his brother at the time of his death.

Sir R. T. Reid, A.G., in reply.

WRIGHT J. Upon the main question, I think that we are bound by the decision of the House of Lords in *Lord Advocate* v. *Bogie*. (3) The reasoning in that case and the applicability of the decision are not affected by the fact that there are words in

(1) [1894] A. C. at p. 95. (2) Law Rep. 4 Ex. 27.
(3) [1894] A. C. 83.

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the present will which were not in the will there under consideration. In that case Lord Watson suggested that although, looking at it in the light of a duty imposed by statute, the Crown had no right to the duty claimed, it might have a right as a legatee or as a cestui que trust. There is no room for that suggestion in the present case; no trust could be implied which was not a matter of necessary implication, and it is certainly not necessary to imply that Lewis Loyd had any such intention. There is in my opinion no ground for the contention of the Crown.

COLLINS J. concurred.

Judgment for defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the defendants: *Dowson, Ainslie, & Martineau.*

W. J. B.

C. A.

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Jan. 16.

[IN THE COURT OF APPEAL.]

HYDARNES STEAMSHIP COMPANY *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

Insurance (Marine)—Policy, Construction of—Clause partly in Print and partly in Writing—Rejection of Words wholly inapplicable—Attachment of Policy.

By a policy of marine insurance, partly in writing and partly in print, it was declared, in a part of the policy which was in writing, that the insurance was upon "freight of meat at and from Monte Video" to any ports in the River Plate, including the Boca, and thence to the United Kingdom, and that the underwriters should be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel. By a subsequent clause of the policy it was declared that the assurance should commence "upon the freight and goods or merchandize on board from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." The name "Monte Video" in this clause was in writing, the rest of the clause being in print. After the arrival of the ship at Monte Video on her outward voyage, she proceeded to the Boca, where a cargo of meat was ready for shipment; but her refrigerating machinery then broke down so completely as to render it necessary to abandon the design of loading the meat. At the date of the policy it was known to both underwriters and assured that meat never was and could not be loaded at Monte Video in consequence of the absence of appliances for freezing the meat at that port:—

Held (reversing the decision of Wills J.), that, the words in the clause

defining the commencement of the risk with regard to the loading of the goods being absolutely inapplicable under the circumstances of the case, they must be rejected, and therefore the policy attached, although no meat was ever loaded on board the ship.

APPEAL from the judgment of Wills J. (1)

The action was brought to recover a sum of 2000*l.* under a policy of marine insurance on freight. The policy was on a printed form which contained terms, some of which were adapted for insurance on ship and others for insurance on goods or freight as the case might require. So far as material, the policy was as follows, the words in italics being in writing, the rest in print. The assurance was declared to be upon "*freight of meat valued at* 3000*l. warranted free from all claims* (*except general average and salvage charges*) *unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel*, the ship or vessel called the *Hydarnes* (S) lost or not lost at and from *Monte Video to any ports or places in any order backwards and forwards in the River Plate* (*including the Boca*) $\frac{and}{or}$ *the River Parana* $\frac{and}{or}$ *Uruguay, and thence to any port or ports of the United Kingdom* $\frac{and}{or}$ *Continent of Europe not north of Hamburg, that port included, in any order, and thence to any port or ports in the United Kingdom in any order, with leave to call and wait at any port, ports, and places for all purposes* (*especially in any order in the Brazils either to discharge or take in cargo or for any other purposes*) *with leave to tow and be towed and assist vessels in all situations* . . . . The assurance aforesaid shall commence upon the freight and goods or merchandize on board thereof from the loading of the said goods or merchandize on board the said ship or vessel at *Monte Video*, and shall continue until the said goods or merchandize be discharged and safely landed at *as aforesaid*."

The freight insured arose under a contract between the plaintiffs and certain merchants for the carriage of a cargo of frozen meat in the plaintiffs' ship from Boca, Buenos Ayres, to the United Kingdom. By that contract it was provided that the ship's refrigerating engine should be worked until the temperature in the refrigerating chambers, in which the meat was to be

(1) [1894] 2 Q. B. 590.

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loaded, should be reduced below 28° Fahr., and then, and not till then, the ship's agents should give written notice that she was lying ready to receive the meat. It was provided that the charterers should pay freight on the arrival of the ship at the port of discharge of the meat intended for such port, and that such freight should be payable on all carcases that might be shipped at the Boca, Buenos Ayres, for such port at certain rates.

At the time when the policy was entered into no meat ever was or could be loaded at Monte Video, there being no appliances for freezing meat there. It appeared that it was necessary to work the refrigerating machinery for the purpose of lowering the temperature of the refrigerating chambers for some time before the meat could be shipped, and, consequently, the usual course, if the refrigerating chambers had been cleared of outward cargo at Monte Video, would have been to start the machinery either there or on the voyage thence to Buenos Ayres, and to keep it going during the process of loading and until the ship finally sailed from the River Plate. The above facts were known both to the plaintiffs and defendants when the policy was entered into.

The ship arrived at Monte Video on her outward voyage, and, having there discharged outward cargo, proceeded to Buenos Ayres. The refrigerating chambers not being cleared at Monte Video of outward cargo, the refrigerating machinery was not started till the arrival of the ship at the Boca, Buenos Ayres. It was then started and worked for some time; but, the stipulated degree of cold not being reached, no notice was given to the charterers' agents that the ship was ready, and the ship never was in fact ready to receive the cargo of meat which the charterers had ready for shipment. The refrigerating machinery then broke down in a way and under circumstances which rendered repair in South America impossible, and the adventure, so far as the carriage of the meat was concerned, was properly abandoned, and notice of abandonment duly given to the defendants.

Wills J. held that, no meat ever having been loaded, the policy did not attach, and gave judgment for the defendants.

Sir R. E. Webster, Q.C., and *Bigham, Q.C.* (*Horridge*, with them),

for the plaintiffs. The object of the policy, having regard to the circumstances under which it was entered into, and the usual practice with regard to the shipment of frozen meat, which was known to all parties, obviously was to cover the risk of loss of freight by the breaking down of the refrigerating machinery during the period whilst such machinery might have to be worked—namely, from the time when the vessel had discharged at Monte Video until she finally sailed from the River Plate. After the sailing of the ship with the meat on board, inasmuch as the freight was payable upon the meat shipped at Buenos Ayres on the arrival of the ship at the port of discharge, whether the meat had to be jettisoned or not, the non-arrival of the ship was the only risk to which the freight was exposed. It is contended that, if there was a loss of the freight by reason of the machinery breaking down at any time between the ship's arrival at Monte Video and her final sailing from Buenos Ayres, the policy attached. A policy on freight attaches if a cargo is ready, although it is not shipped: *Thompson* v. *Taylor* (1); *Davidson* v. *Willasey*. (2) The freight began to be earned when the refrigerating machinery was set to work. The loss of it was undoubtedly occasioned by the breaking down of the refrigerating machinery—which was a risk expressly provided against by the policy. The only question is whether the risk had attached. It was said that it had not, by reason of the words of the clause with regard to the commencement of the risk. But the words in that clause with regard to the loading of goods are plainly inapplicable, because it was known to all parties that no frozen meat ever was or could be shipped at Monte Video. The words are merely part of a printed clause in a common form. It may be admitted that they must, if possible, have an application; but here they are absolutely inapplicable, and therefore must be rejected. It is submitted that the policy attached at Monte Video. The defendants' construction of the policy gives no effect to the words "at and from Monte Video." [They also cited *Forbes* v. *Aspinall* (3); *The Main*. (4)]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants.

(1) 6 T. R. 478.
(2) 1 M. & S. 313.
(3) 13 East, 323.
(4) [1894] P. 320.

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The clause in the policy which describes the voyage is distinct from that which defines the commencement of the risk. The words "at and from Monte Video" describe the commencement of the voyage; but the risk does not necessarily commence there. The subsequent clause defines the commencement of the risk. Though the bulk of the clause is printed and is common form, no words of the clause can be rejected which are capable of a sensible application. The words describing the risk as commencing on the loading of the goods are quite capable of such an application, although frozen meat could not be loaded at Monte Video. Monte Video is the first of several places at which goods might be loaded in the River Plate, and there is a well-known mode of interpretation by which, when a series of loading ports are mentioned in a policy on goods, the name of the first of them, when used in the clause defining the commencement of the risk, may be treated as a compendious expression meant to include the others. See Arnould, Part I. c. 9, 5th ed. p. 383; 6th ed. 384; and authorities there cited. Therefore, in the place of the name Monte Video must be read in the name of the port of loading. The words "at Monte Video" in the clause defining the commencement of the risk are in writing, and therefore the clause was clearly intended to apply to this insurance; and by construing it as suggested, effect is given to all the words of the policy. That construction still leaves a substantial risk to which the policy would apply—namely, the breaking down of the machinery after some goods were loaded, but before the completion of the loading, or before the ship finally sailed from Buenos Ayres. The cases of *Beckett* v. *West of England Marine Insurance Co.* (1) and *Hopper* v. *Wear Marine Insurance Co.* (2) shew that the clause as to the commencement of the risk cannot be rejected.

LORD ESHER M.R. The instrument which we have to construe is a puzzle; but we must endeavour to construe it in a businesslike way, so as to give it a sensible application. In order to do so, we must look at the facts which existed at the time when it was made. There was a contract by the assured for the carriage of frozen meat by their ship from the River Plate to the United

(1) 25 L. T. 739. (2) 46 L. T. 107.

Kingdom, which contract was known to the defendants. The subject-matter to be insured was the freight to be earned by the carriage of the frozen meat. It was known to both parties that frozen meat could not be and never was loaded at Monte Video. It was also known to both parties that refrigerating machinery would have to be used as has been described, and that there was reason to apprehend that the machinery might break down, and, if it did break down, the earning of the freight might be prevented. Under those circumstances the policy is entered into. By that policy the assurance is declared to be upon "freight of meat valued at 3000*l.* warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel." The insurance is expressed to be "at and from Monte Video." The insurance being against loss of freight through the breaking down of machinery, one would expect that the risk would commence when the machinery was in danger of breaking down: that it would cover the period whilst the ship was in the River Plate and until her final sailing, during which the machinery had to be used. But then there is the clause which says that the assurance "shall commence upon the freight and goods or merchandize on board thereof from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." But, so far as frozen meat is concerned, it was known to all parties that it was impossible that such meat should be loaded at Monte Video. It seems to me that, if the clause be construed to mean that the insurance against loss of the freight for carriage of the meat through the breaking down of machinery is to commence when the meat is loaded at Monte Video, although no such meat ever is or can be loaded at Monte Video, the result from a business point of view is insensible. This clause, with the exception of the words "Monte Video," is in print. The policy is not in the form of a Lloyd's policy. It is obviously a general form adopted by this insurance company. The company are insurers of ship, goods, or freight as the case may be. They appear, for the purpose of saving time or expense, or for some such reason, to find it convenient to have a general printed form

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Lord Esher M.R.

of policy which may be used, not always for insuring all those subject-matters, but sometimes for insuring all and sometimes for insuring one or other of them. It is impossible that the whole of the form can be applied when they are only insuring some or one of these subject-matters. When they are insuring goods, for instance, the part of the form which relates to insurance on ship only is inapplicable. Therefore it is inevitable in such a case that some part of the form should be struck out. Here we have an insurance on freight only. Therefore, any part which is only applicable to ship or goods must be struck out. If this were a case of insurance on freight that could be earned in respect of goods or merchandize to be loaded at Monte Video, the case of *Beckett* v. *West of England Marine Insurance Co.* (1) seems to shew that in construing the policy the words relied on by the defendants must be left in; but in this case we cannot leave them in, I think, because they are altogether inapplicable, the insurance being on frozen meat, and Monte Video not being the port of loading for frozen meat. If the terms of the clause were to be applied as contended for by the defendants, it would import that the risk is to attach on the loading of meat at a port at which all parties knew the meat never could be loaded. That does not appear to me to be business. Therefore, I think we must strike out the words with regard to the loading of the said goods or merchandize on board the said ship or vessel. If those words are struck out, the provision is that the assurance shall commence upon the freight at Monte Video. So treating it, we are not doing what the learned judge in the Court below thought he could not do. We have not struck out the clause defining the commencement of the risk. We have only struck out of it words which are altogether inapplicable. It appears to me that by that construction we make the insurance cover the very risk which was obviously one of the principal matters insured against, namely, the loss of freight through the breaking down of the refrigerating machinery, which might occur at Monte Video, or during the voyage from Monte Video to the port at which the meat was to be loaded, or while the ship was at such port of loading. I think that this is

(1) 25 L. T. 739.

the proper construction of the policy, and that the rule of construction applied by the learned judge in the Court below was too strict. For these reasons I think the appeal should be allowed.

LOPES L.J. I am of the same opinion. The question is whether the risk had attached. It was said, on the one hand, that it had never attached, because no meat ever was loaded on board the ship. It was said, on the other hand, that it had attached, because the refrigerating machinery broke down after the vessel had left Monte Video, and before she finally sailed from Buenos Ayres. The question depends on the construction of the policy, which like any other document must be construed as far as possible according to the ordinary meaning of the words used, having regard to the circumstances which existed at the time when the contract was made. In this case it was well known to both parties to the contract that no frozen meat ever was loaded at Monte Video. It was also clear that, as soon as the vessel finally sailed with the meat on board, the freight would no longer be at risk, except in the event of the ship's not arriving, because by the terms of the contract the freight was to be earned on the arrival of the ship, even though the meat should have had to be jettisoned. Therefore, what the assured especially required to be protected against was the loss of the freight, not by a peril of the sea, but by the breaking down of the refrigerating machinery during the period which elapsed between the ship's arrival at Monte Video and her final sailing on her voyage to England. The very object of the insurance was to cover that period. That being so, the insurance is expressed to be upon "freight of meat valued at 3000*l*, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel . . . . at and from Monte Video . . . . to any port or ports in the United Kingdom." If it had stopped there I should imagine there would have been no difficulty in construing the words. The difficulty arises from a subsequent part of the policy, which is mainly in print, and which states

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Lopes L.J.

that "the assurance aforesaid shall commence upon the freight and goods or merchandize on board thereof from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." It is argued that the meaning of that clause is that the risk was not to attach until the frozen meat had been loaded. But it appears to be impossible to give it that meaning, because it is admitted that all parties knew that frozen meat could not be loaded at Monte Video, which is the place mentioned in the clause. This clause, as it stands, is clearly inconsistent with the previous part of the policy. The question is which portion of the policy is to take effect. It appears to me that we must give effect to the earlier part, and reject so much of the subsequent printed clause as refers to the loading of the said goods or merchandize on board the said ship or vessel, as being inapplicable to the state of things which existed. Rejecting those words, the effect is that the insurance is on freight, and is to commence at and from Monte Video. Upon this construction of the policy all difficulty disappears.

RIGBY L.J. I am of the same opinion. In this case we have to construe a document consisting in part of printed matter, some of which can have no application to the contract between the parties, and in part of written matter, which no doubt expresses their real intention. Looking in the first place at the written terms, we find in them a clear indication of the intention of the parties with regard to the period which the insurance was to cover. The freight is expressed to be insured "at and from Monte Video to any ports or places in any order backwards and forwards in the River Plate, including the Boca, . . . and thence to any port or ports of the United Kingdom $\frac{\text{and}}{\text{or}}$ Continent of Europe not north of Hamburg, that port included, in any order, and thence to any port or ports in the United Kingdom in any order." It is said that this clear statement as to the period to be covered is controlled by the printed clause which follows, and that the effect of that clause is that the insurance was not to commence until meat was loaded. I agree that, where there are general words in a contract which may have an application to a state of things existing under the contract, the Court ought to

be very cautious in rejecting them, even though they are common form, in the absence of very strong reasons for doing so. In the present case, however, it appears to me that the words "from the loading of the said goods or merchandize on board the said ship or vessel" can have no possible application. That being so, I think the clause ought to be read as if they were omitted, and it would then stand, "the assurance aforesaid shall commence upon the freight at Monte Video." I should have no difficulty in so construing the policy but for the decision in *Beckett* v. *West of England Marine Insurance Co.* (1) I must admit that on the terms of the policy in that case I should have thought that the words in the printed clause with reference to the commencement of the risk might have been treated as inapplicable and therefore rejected. I do not quite understand the case, because the words in the printed clause stated that the insurance should commence "upon the freight and goods or merchandize 'aforesaid' from the loading the 'said' goods or merchandize on board the said ship;" but the policy does not appear to have previously mentioned any goods or merchandize, but was a mere insurance on freight, and therefore it is difficult to see how those words could apply. That decision has raised the only doubt which has occurred to my mind with regard to the present case, and, if I found that it laid down anything in the nature of a general canon of construction, I should probably have felt bound by it. But on considering that case, I do not find that it lays down any such canon of construction. I do not think that it really governs the present case. It differs from this case very materially. There the ship was to load the cargo at Lagos, and the insurance on the freight was expressed to be at and from Lagos. The question was whether the risk attached when the ship arrived at Lagos, or only when the cargo was loaded at Lagos; and the view which the Court adopted was that the meaning of the words "at and from Lagos" was affected by the words "from the loading the said goods, &c.," in the subsequent clause. In the present case, having regard to the fact that no meat ever was or could be shipped at Monte Video, those words can have no application; and, when I find that by

(1) 25 L. T. 739.

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HYDARNES STEAMSHIP COMPANY v. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

Rigby L.J.

rejecting them we shall be giving effect to what appears to be the meaning of the parties as expressed in the precise language of the written part of the contract, I am of opinion that that is the construction which we ought to adopt. It was said that, although the meat could not be loaded at Monte Video, the name of that place ought to be taken as a compendious description of the various ports at which it might be loaded. I cannot adopt that view. I can understand that, where several ports of loading are mentioned, the subsequent mention of the first of them may be treated as including all the others, if there is nothing to the contrary. But I cannot understand how that mode of construction can be applied to a case where the place mentioned cannot be a port of loading. It appears to me that there can be very little doubt as to the meaning of this contract apart from the authority of decided cases, and I do not think that any of the cases cited really hinders us from giving it that meaning.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

E. L.

1895 *Jan.* 26.

IN RE AN ARBITRATION BETWEEN JAMIESON AND THE NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCIATION.

Insurance (Marine)—Loss of Freight—"Cancelling of Charter"—Delay through Perils of Sea—Frustration of Adventure.

A policy of insurance upon freight contained the provision "No claim arising from the cancelling of any charter . . . shall be allowed." The vessel on her way to the port of loading under a charterparty was so delayed by perils of the sea that the voyage contemplated by the charter became impossible; but no actual setting aside of the charter took place between the parties. In an action on the policy:—

Held, that the charter had been cancelled within the meaning of the provision, and the insurers were not liable.

AWARD stated by an arbitrator in the form of a special case for the opinion of the Court.

The material parts of the case were as follows:—

"The claim in respect of which the dispute arose was a claim

by George Jamieson, who was the owner of the steamship *Abrota*, against the Newcastle Steamship Freight Insurance Association for 762*l.* 16*s.* 11*d.*, alleged to be due under a marine policy of insurance for 800*l.* upon the freight of the *Abrota*, which policy was dated 23rd February, 1893, and was executed by the above-named association. It was a time policy, the insurance being from the 20th February, 1893, to the 20th February, 1894, and the rules of the association formed part of the policy. The risks insured against included perils of the sea, and by rule 8 it was provided that 'no claim arising from the cancelling of any charter nor for loss of time under a time charter' should be allowed.

"On the 10th October, 1893, whilst the policy was in force, a charterparty was entered into between the owners of the *Abrota* and Messrs. Math. Ullern & Cie. of Honfleur, by which the *Abrota* was chartered by Messrs. Math. Ullern & Cie. to proceed to Kotka and there load a cargo for Honfleur.

"On the 14th October, 1893, the *Abrota* left St. Petersburg for Kotka, and on the same day stranded on Leskar Island. On the 15th October she was got off and proceeded to Aspea, and on the next day was taken to Helsingfors, where it was found that she had sustained considerable damage. The repair of the damage was commenced on the 31st October, and was completed on the 11th December. In the meantime, about the 4th December, the port of Kotka had become closed for the winter by ice.

"On the 26th October, 1893, the charterers sent a telegram to Mr. Jamieson inquiring whether the *Abrota* would load at once or whether he would cancel the charterparty. The telegram was in French, as follows: 'Télégraphiez si *Abrota* chargera immédiatement ou si vous résiliez.'

"On the 27th October Mr. Jamieson wrote to his brokers Messrs. Finzi & Co., asking them to reply to the charterers' telegram, and stating as follows: 'The position is, if we cancel the charter we void our insurance. Now, it is for the cargo owners to act, that is to say, charter another steamer and bring the cargo away, giving us notice of their intention of doing so, and for them to run the risk of cancelling the charter, as we

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cannot take this responsibility on our shoulders.' Messrs. Finzi & Co. accordingly wrote to the charterers in accordance with Mr. Jamieson's instructions, and the charterers on the 31st October sent to Mr. Jamieson a telegram, of which the following is a translation: 'Your agents have declared the *Abrota* is unable to fulfil the charter, inviting us to charter another ship; the charter of the *Abrota* is therefore annulled.' On the same day Mr. Jamieson replied by a telegram in the following terms: '*Abrota* cannot agree cancel charter; if you forward by another steamer you must take all responsibility.' The charterers however, being unwilling to wait for the *Abrota*, refused to load her under the charterparty, and forwarded their cargo by another steamer.

"I find as a fact that on the 14th October, 1893, the vessel was damaged by perils of the sea, and that the time necessary for repairing such damage was so long that the voyage contemplated in the charterparty became in a commercial sense impossible. I find that on the 31st October, 1893, there was no probability that the vessel could be loaded at Kotka within a reasonable time, and that the charterers were therefore entitled then to give, and did give, notice to the shipowners that they would not load the vessel under the charterparty.

"I find that there was under these circumstances a loss of freight by perils insured against in respect of which Mr. Jamieson would be entitled to recover 762*l.* 16*s.* 11*d.* from the association if his claim is not a claim arising from the cancelling of any charterparty within the meaning of rule 8.

"Construing the words of rule 8 in the sense in which they would be ordinarily understood by men of business, especially having regard to the object of the words in question, I find that under the circumstances which I have set forth the charterparty was cancelled within the meaning of the rule, and I find that Mr. Jamieson's claim is a claim arising from the cancelling of a charterparty.

"Subject, therefore, to the opinion of the Court on the question hereinafter stated, I award that George Jamieson is not entitled to recover anything from the Newcastle Steamship Freight Association in respect of any of the matters in dispute.

"The question for the opinion of the Court is whether, under

the circumstances stated in this case, the claim of Mr. Jamieson is a claim arising from the cancelling of a charterparty within the meaning of rule 8.

"No witnesses were called before me to prove that the word 'cancelled' has any technical or peculiar meaning in shipping or insurance business. It was not contended that the word had acquired any such technical or peculiar meaning."

Bigham, Q.C. (*H. F. Boyd*, with him), for the plaintiff. Rule 8 does not apply because the charterparty was not "cancelled."

To constitute a "cancelling" there must be some act of the parties. No doubt the charterparty had come to an end, because the adventure was frustrated by perils of the sea. The shipowner had, therefore, lost the chartered freight, and the insurers are liable: *Jackson* v. *Union Marine Insurance Co.* (1); but the charter was not "cancelled," since there was no act of the parties putting an end to it. [He referred to *Mercantile Steamship Co.* v. *Tyser.* (2)]

Finlay, Q.C. (*Scrutton*, with him), for the defendants. The word "cancelling" is not confined to a setting aside by the act of the parties. It is often used figuratively. It can make no difference whether the charterparty has come to an end in consequence of the frustration of the adventure by something over which the parties had no control, or whether it ceased to exist by agreement between them. [He cited *Inman Steamship Co.* v. *Bischoff* (3) and *The Bedouin.* (4)]

Boyd, replied.

CHARLES J. In this case the question that we have to decide is raised by a special case stated by an arbitrator, and turns on the terms of a policy of insurance. The policy was a time policy upon freight, the insurance being for a year, and the rules of the insurance association formed part of the policy. By one of those rules "No claim arising from the cancelling of any charter nor for loss of time under a time charter shall be allowed"; and by another rule the perils to be insured against are (amongst others)

(1) Law Rep. 10 C. P. 125.
(2) 7 Q. B. D. 73.
(3) 7 App. Cas. 670.
(4) [1894] P. 1.

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Charles J.

"perils of the sea." The words that we have to interpret are "the cancelling of any charter." On October 10, 1893, whilst the policy of insurance was in force, the owners of the vessel entered into a charterparty in accordance with which their vessel left on October 14 for Kotka, a port in the Baltic, there to load a cargo for Honfleur. The same day, however, she stranded on Leskar Island, and, although she was got off, she had sustained considerable damage, and her repairs were not completed until the season had elapsed and the port of Kotka had become impracticable in consequence of its being blocked by ice. The arbitrator finds as a fact that the vessel was damaged by perils of the sea, and that the time necessary for repairing such damage was so long that the voyage contemplated in the charterparty became in a commercial sense impossible. He further finds that, construing the words of the rule in the sense in which they would be ordinarily understood by men of business, the charterparty was "cancelled" within the meaning of the rule.

The whole question is whether the total frustration of the adventure does or does not amount to a "cancelling" of the charter within the meaning of the rule. There is no doubt, having regard to the finding of the arbitrator, that the adventure was totally frustrated, and, therefore, if no special words had been used in the policy, the case would fall within the decision in *Jackson* v. *Union Marine Insurance Co.* (1) In that case the effect of the total frustration of an adventure was fully considered, and it was decided that, under circumstances very similar to those in this case, the charterers of the vessel could not be compelled to load her, and that there was therefore a loss of the chartered freight by perils of the sea. Consequently, the risk insured against attached and the insurance company were liable. That decision would, no doubt, govern this case but for the restrictive words, "No claim arising from the cancelling of any charter shall be allowed." It is said that, if this vessel had subsequently been loaded, she would have been loaded under a new charter, as the old charter had come to an end when the contemplated voyage became impossible. As Bramwell, B., says, in *Jackson* v. *Union Marine Insurance Co.* (2): "There is a con-

(1) Law Rep. 10 C. P. 125. (2) Law Rep. 10 C. P. 125, at p. 145.

dition precedent that the vessel shall arrive in a reasonable time. On a failure of this, the contract is at an end and the charterers discharged." And again (on p. 148): "If I am right that the voyage, the adventure, was frustrated by perils of the seas, both parties were discharged and a loading of cargo in August would have been a new adventure, a new agreement." The case is, in fact, similar to *Taylor* v. *Caldwell* (1), where a contract for the hire of a hall was held to be at an end when the hall was burnt down, as there was nothing on which the contract could operate. The voyage in the present case had become impossible; therefore the agreement was at an end, and the insurance company would consequently be liable for the loss of the chartered freight but for the restrictive words in the rule.

In my opinion, the view taken by the arbitrator of the words was right. "Cancelling" is, no doubt, not altogether a happy word to use; but the substance of the rule is that when the agreement—the charterparty—has ceased to exist, the claim against the insurers for the loss of the chartered freight shall come to an end also. I think that the mode in which that is indicated is immaterial. No doubt, in one sense, the word "cancelling" would seem to point to some act of the parties, and it is true that here the parties did not by any voluntary act "cancel" the charterparty; but I think that "cancelling" can be effected by the occurrence of facts, quite apart from the will of the parties, which shew that the charterparty has ceased to exist, and that neither party could sue the other upon it. It is suggested that, although it may cease to exist as a charterparty, it may still continue as an agreement between the parties. I do not think so. In my opinion, it has passed away altogether and does not exist at all, and therefore it is, within the words of the rule, "cancelled." To hold otherwise would result in the anomaly that, if the parties had met and agreed that neither could sue the other on the charterparty, the insurers of the chartered freight would not be liable; whereas, if nothing was done by them and the performance of the contemplated voyage was equally impossible and so both parties were discharged, the liability would attach. The facts being the same, it can make

(1) 3 B. & S. 826.

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no difference whether there was a verbal or a tacit agreement that the charterparty was at an end.

In my opinion, it would be an undue restriction of the rule to say that the word "cancelling" only applies where the agreement has come to an end by the act of the parties. I think that the arbitrator was right and that his award must be upheld.

KENNEDY J. I agree.

Judgment accordingly.

Solicitors for plaintiff: *Botterell & Roche.*
Solicitors for defendants: *Thos. Cooper & Co.*

A. P. P. K.

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Jan. 19, 21.

WILKINSON *v.* PEEL AND OTHERS.

Landlord and Tenant—Distress—New Tenancy—8 *Anne, c.* 14, *ss.* 6, 7.

The right to distrain after the expiration of a tenancy given by 8 Anne, c. 14, ss. 6, 7, does not apply where the tenant remains in possession of part of the demised premises under a new tenancy created by agreement.

Nuttall v. *Staunton* (4 B. & C. 51) distinguished.

CASE stated under Order XXXIV., r. 1.

The plaintiff was the administratrix of her deceased husband, who died on May 16, 1893. The defendants were the trustees of the will of Dr. John Radcliffe, deceased, and were the owners of a farm known as Brickkiln Farm, situate at Wolverton, in the county of Buckingham. The plaintiff's husband had for many years been tenant of this farm, which consisted of a house and buildings and 412 acres of land, under a yearly tenancy at a yearly rent, payable half-yearly at Michaelmas and Lady Day. On April 5, 1892, he gave, and the defendants accepted, notice to quit Brickkiln Farm on April 5, 1893. Prior to the expiration of the notice to quit, he agreed with the defendants to continue to occupy, and the defendants agreed to let to him, four fields containing forty-eight acres or thereabouts, and being part of Brickkiln Farm, after such expiration, and he continued to occupy those four fields until his death. The rent payable for such four fields was to be paid half-yearly. On April 5, 1893, he gave up possession of Brickkiln Farm, with the exception of

the four fields, which he continued to occupy under the before-mentioned agreement. The plaintiff, after the death of her husband, continued to occupy the four fields in the same manner in which they had been occupied by her husband between April 5, 1893, and his death.

He was, at the time of his death, and the plaintiff as his administratrix was, indebted to the defendants in a sum of 253*l.* 16*s.* 6*d.* in respect of rent for Brickkiln Farm. The defendants claimed the right to distrain for the rent so due, upon the distrainable goods belonging to the deceased's estate which were upon the said four fields; and on June 10, 1893, they issued a distress warrant and distrained the goods on the said four fields accordingly.

It was agreed between the plaintiff and the defendants that, without prejudice to their respective rights, the goods so distrained should be sold and the proceeds held to abide the result of the action.

The plaintiff brought an action for wrongful distress, contending that the tenancy of Brickkiln Farm, having determined by notice to quit on April 5, 1893, the defendants had, under the circumstances, no right to distrain on the four fields for the rent due in respect of Brickkiln Farm. The defendants contended that they were entitled to distrain under 8 Anne, c. 14, s. 6. (1)

J. C. Earle, for the plaintiff. The statute of Anne does not

(1) By 8 Anne, c. 14, s. 6, "And whereas tenants pur autre vie and lessees for years or at will frequently hold over the tenements to them demised after the determination of such leases, and whereas after the determination of such or any other leases no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof, it is hereby enacted that . . . it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives or for years or at will ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined."

Sect. 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

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apply where a new tenancy is created. The tenancy of Brickkiln Farm had determined, and the plaintiff's husband entered on a new tenancy of the four fields which was created by the agreement. The case differs from *Nuttall* v. *Staunton* (1), where there was a mere permission to the tenant to stay on, and no new tenancy was created. The statute only applies to a holding over of the premises, and not to a new tenancy. By the agreement to let the four fields to the tenant, the defendants impliedly covenanted for his quiet enjoyment of them, and the distress was a breach of that covenant. [He cited *Turner* v. *Barnes* (2); *Tayleur* v. *Wildin.* (3)]

E. F. V. Knox, for the defendants. The statute of Anne applies so long as the tenant continues in possession of the whole or part of the premises in respect of which the rent accrued due. Every case of holding over creates some kind of tenancy unless it is tortious, and it makes no difference whether the tenant is tenant at will or on sufferance, or whether he holds under an agreement: Co. Litt. 57 b, 270 b. *Nuttall* v. *Staunton* (1) is precisely in point. [He cited *Taylerson* v. *Peters* (4) and *Braithwaite* v. *Cooksey.* (5)]

Earle, replied.

LAWRANCE J. In this case the question that we have to decide is whether the defendants had the right to distrain upon four fields for the rent due for a certain farm. As I understand them, the facts of the case are these. The plaintiff's husband was for many years the tenant of a certain farm belonging to the defendants, and known as Brickkiln Farm, at Wolverton. On April 5, 1892, he gave notice to quit, and, in accordance with that notice, his tenancy came to an end on April 5, 1893. Before his tenancy came to an end, however, he had agreed with the defendants to continue to occupy the four fields in question, which formed part of Brickkiln Farm, on certain terms, and accordingly when, on April 5, 1893, he gave up the rest of the farm, he remained tenant to the defendants of these four fields.

(1) 4 B. & C. 51.
(2) 31 L. J. (Q.B.) 170.
(3) Law Rep. 3 Ex. 303.
(4) 7 Ad. & E. 110.
(5) 1 H. Bl. 465.

He died on May 16, 1893, and the plaintiff, as his administratrix, continued to occupy the four fields. At the time of his death he was indebted to the defendants in respect of some rent due on Brickkiln Farm, and the defendants claim the right to distrain on the goods belonging to his estate, which were upon the four fields, for such rent. Their ground for this contention is, that, since those four fields formed part of Brickkiln Farm, the statute of Anne gave the defendants the right to distrain upon them. The question is whether a new tenancy of these fields had been created, or whether the tenant was holding over the four fields within the meaning of the statute. The case of *Nuttall* v. *Staunton* (1) was cited as an authority for the contention of the defendants. In that case no rent was to be payable by the tenant, who, by the landlord's permission, remained in possession of part of the demised premises after giving up the remainder; but he was in fact to be paid by the landlord for such services as he might render him, and the question was whether the permission thus given by the landlord to the tenant to remain in possession of part of the demised premises gave the landlord the right to distrain on that part for rent accrued due in respect of the whole of such premises. It was held that it did. There is no case, however, where a new tenancy of part of the demised premises has been created, in which the landlord's right to distrain on such part for the rent due for the whole has been upheld. Here, in my opinion, the old tenancy had determined, and an entirely new tenancy of these four fields had been created; and I do not think that the mere fact that the four fields formed part of the Brickkiln Farm gives the landlord a right to distrain upon them for rent accrued due in respect of the whole of such farm. Our judgment, therefore, must be for the plaintiff.

KENNEDY J. It is unnecessary for me to recite the facts, the substance of which has been stated by my brother Lawrance. I agree in the conclusion at which he has arrived. Looking at the statute of Anne, and at the language used in the cases which have been referred to—none of which are precisely in point—I am of opinion that the statute does not apply to a case where,

(1) 4 B. & C. 51.

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Kennedy J.

before the determination of the old tenancy, an agreement is entered into between the landlord and the tenant whereby a new tenancy is created, because in that case the tenant does not continue in possession after the expiration of the old tenancy, but commences to hold under the new tenancy. I think the words in s. 7 of 8 Anne, c. 14, "during the possession of the tenant," mean "while he continues in possession." Of course, in one sense, the tenant continued in possession of these four fields; but the possession was under a new right and a new title created by the agreement with the defendants. It seems to me that to apply the right to distrain for the old rent, given by the statute to a tenant holding under a new agreement, would make him liable to two rights of distress—one under the old and one under the new agreement. I do not think that such a case was either within the words or the intention of the statute; and I hold, therefore, that the statute does not apply, and that the defendants had no right to distrain on the four fields for the rent of Brickkiln Farm.

Judgment for the plaintiff.

Solicitor for plaintiff: *William Sturt, for W. R. Parrott, Stony Stratford.*

Solicitors for defendants: *Longbourne, Stevens, & Powell.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 14, 19.

HENDERSON & CO. *v.* WILLIAMS.

Bailor and Bailee—Warehouseman—Estoppel—Property in Goods obtained by Fraud—Jus tertii—Trover—Measure of Damages.

The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., and the goods were accordingly placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman :—

Held, that the warehouseman, having attorned to the purchaser, was estopped from impeaching his title, that the refusal to deliver was a conversion, and that the measure of damages was the market value of the goods at the date of the refusal.

Per Lord Halsbury: The true owner, having enabled F. to hold himself out as the owner, could not set up his title against that of the purchaser: *per* Lindley L.J. it should be so held on principle, but quære whether the facts were distinguishable from those of *Kingsford* v. *Merry* (1 H. & N. 503.)

Kingsford v. *Merry* (1 H. & N. 503), *Attenborough* v. *London and St. Katharine's Dock Co.* (3 C. P. D. 450), and *Biddle* v. *Bond* (6 B. & S. 225) discussed.

In this case appeals were brought by the plaintiffs and the defendant against a judgment of Cave J., without a jury. The action was for damages for the wrongful detention or conversion of 150 bags of sugar. The defendant by his defence denied that the sugar was the property of the plaintiffs. The facts were as follows. The plaintiffs were sugar merchants of Hull. The defendant was a warehouseman carrying on business at Hull and Goole. On June 3, 1894, one Fletcher, by pretending that he was Robinson, negotiated a purchase of 150 bags R. A. V. sugar from Messrs. Grey & Co., sugar merchants, of Liverpool, they believing that they were dealing with Robinson, a well-known customer of theirs, through Fletcher as his agent. On June 6 Grey & Co. sent to the defendant, who then held the 150 bags of sugar in a warehouse at Goole, the following telegram: "Transfer to order of Fletcher, Leeds, 150 R. A. V." The defendant replied on the same day by a letter, in which, after

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referring to some other sugar, he proceeded: "I have your telegram to transfer the balance (150 bags) to Mr. W. Fletcher, of Leeds, at whose disposal I have placed the sugar. Please note."

On the same day, and before the receipt of this letter, Grey & Co. wrote to the defendant, with reference to these 150 bags of sugar, as follows: "Please hold these to the order of Mr. W. Fletcher, Leeds, and accept his instructions for delivery. Freight and landing charges to our account." Fletcher, having committed this fraud upon Grey & Co., then negotiated with the plaintiffs to sell the sugar to them, together with some other sugar which was in the defendant's warehouse, for cash. At this time Fletcher was indebted to the plaintiffs in the sum of 131*l.*, for which he had given a cheque which had been dishonoured; and, as Fletcher required to be paid for the sugar in cash, the plaintiffs, before concluding any contract with him, sent down to the defendant to ascertain if the sugar proposed to be sold to them by Fletcher was in his warehouse to Fletcher's order. The defendant sent back to the plaintiffs the following document, signed by him: "Memorandum. J. L. Williams to Messrs. Henderson & Co., Hull. June 7, 1894. R. A. V. 150 bags of sugar. G. R. 36 bags of sugar. Star 50 bags of sugar, lying at Goole. I hold the above on account of W. W. Fletcher, Leeds, and will deliver same to your order on receipt of his transfer in your favour." The plaintiffs were not satisfied with this document, and again communicated with the defendant, who then wrote across the above-mentioned memorandum as follows: "I hold the within at your order and disposal." Thereupon the plaintiffs purchased the sugar mentioned in the memorandum from Fletcher at the price of 301*l.* 7*s.* 5*d.*

The plaintiffs deducted from the price of the sugar the sum of 131*l.* 16*s.* for returned cheque and expenses, and also a further small sum of 1*l.* 15*s.* 6*d.* (as to which no question arose), in respect of some previous transaction, and handed to Fletcher a cheque for the balance, 167*l.* 15*s.* 11*d.*, which he cashed in due course. Grey & Co. having discovered Fletcher's fraud upon them, induced the defendant to detain the 150 bags, and indemnified him for so doing. The defendant accordingly refused to deliver these 150 bags to the plaintiffs, but he delivered to them

the 36 and the 50 bags (which were of the value of 100*l.*), to which Grey & Co. made no claim.

Cave J. held that the defendant could not set up the title of Grey & Co. against the plaintiffs; but with regard to the measure of damages, he held that the plaintiffs were only entitled to the money which they had in their pockets before the sale—namely, 167*l.*, less 100*l.*, the value of the sugar which was not in dispute, treating Fletcher's indebtedness for this purpose as of no value, and he accordingly gave judgment for the plaintiffs for 67*l.* The plaintiffs appealed against the latter part of this judgment, and asked for judgment for the market value of the goods, which was agreed at 216*l.* 12*s.* 6*d.*

The defendant appealed against the whole of the judgment.

Forbes, Q.C., and *Lacey Smith*, (*Scott Fox*, with them), for the plaintiffs. The measure of damages is the market value of the goods at the time of their conversion.

[They were stopped.]

Pickford, Q.C., and *T. Willes Chitty*, for the defendant. The defendant sets up the title of Grey & Co. as a defence to the action, and *Attenborough* v. *London and St. Katharine's Dock Co.* (1) shews that this defence is open to him. The substantial question, therefore, is whether Grey & Co. have a good title as against the plaintiffs. It is submitted that they have. The property in the goods never passed out of Grey & Co. Fletcher obtained the right of possession by a fraud, but no property passed to him; and if the defendant had delivered the goods to the plaintiffs, Grey & Co. could have taken them out of their hands: *Cundy* v. *Lindsay* (2): *Higgons* v. *Burton*. (3)

Forbes, Q.C., in reply. The cases cited on behalf of the defendants are distinguishable from the present on two grounds; 1. Because the real owner of the goods instructed the defendant to hold to the order of Fletcher, and those instructions were acted on; 2. Because the defendant attorned to the plaintiffs' title. Both the defendant and Grey & Co. are therefore estopped from denying that the plaintiffs are the true owners: *Stonard* v.

(1) 3 C. P. D. 450. (2) 3 App. Cas. 459.
(3) 26 L. J. (Ex.) 342.

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Dunkin (1); *Hawes* v. *Watson* (2); *Gosling* v. *Birnie* (3); *Knights* v. *Wiffen* (4); *Gillett* v. *Hill* (5); *Burkinshaw* v. *Nicolls* (6); *In re Bahia and San Francisco Ry. Co.* (7); *Balkis Consolidated Co.* v. *Tomkinson.* (8)

Pickford, Q.C., in reply upon the further authorities, contended that they were inconsistent with *Biddle* v. *Bond* (9) and *Kingsford* v. *Merry.* (10)

[LINDLEY L.J. referred to *Rogers, Sons & Co.* v. *Lambert & Co.* (11)]

Cur. adv. vult.

Dec. 19. LORD HALSBURY. This is an appeal from my brother Cave's judgment in an action in which the plaintiff sues in trover a warehouseman. The real parties to the transaction which gave rise to this litigation are Grey & Co. on the one hand, the original owners of the goods, and the plaintiffs, who are persons entitled to those goods by a transfer made to them. The action arises out of the right to 150 bags of sugar which belonged to Grey & Co. By a fraud Grey & Co. were induced to send a telegram to Mr. Williams, of Goole, directing him to transfer to the order of Fletcher, of Leeds, the 150 bags of sugar now in question.

[His Lordship then referred to the letter of June 6 from Williams to Grey & Co., acknowledging the receipt of the telegram and the letter from Grey & Co. to Williams of the same date confirming the telegram.]

Mr. Williams having duly carried out the instructions contained in the telegram and letter, Mr. Fletcher, who was a fraudulent person, entered into negotiations with the present plaintiffs for the purpose of a sale of the sugar to them. The sale was effected and the transaction concluded in a manner which I will describe presently.

I pause here to consider what was at this time the relative

(1) 2 Camp. 344.
(2) 2 B. & C. 540.
(3) 7 Bing. 339.
(4) Law Rep. 5 Q. B. 660.
(5) 2 C. & M. 530.
(6) 3 App. Cas. 1004, 1026.
(7) Law Rep. 3 Q. B. 584.
(8) [1893] A. C. 396.
(9) 6 B. & S. 225.
(10) 1 H. & N. 503.
(11) [1891] 1 Q. B. 318.

situation of the parties. Grey & Co., the real owners of the goods, had placed with full powers of disposition these sugars in the name of Mr. Fletcher. If the question now to be determined was whether or not any property passed under these circumstances to Mr. Fletcher, I should say that, inasmuch as Fletcher was only the designated consignee and not a person purporting to enter into a bargain or a contract at all, no such property would pass at all; and I think that that view would be in accordance with the decision in *Kingsford* v. *Merry* (1), with respect to which I have to say a word or two presently. But that is not the position in which I regard the transaction so far. It appears to me that quite apart from any contract which might be affirmed or disaffirmed afterwards, the question here is whether the true owner of the goods has so invested the person dealing with them with the indicia of property as that when an innocent person enters into a negotiation with the person to whom these things have been entrusted with the indicia of property the true owner of the goods cannot afterwards complain that there was no authority to make such a bargain. I think a confusion has arisen as to the kind of inferences to be drawn from the case of *Kingsford* v. *Merry* (1)—a confusion of two totally different things. If a contract is induced by fraud, that contract may be affirmed or disaffirmed, and, until it is disaffirmed, any person dealing on the faith of that contract is protected, because until it is disaffirmed it is a perfectly good contract. I think it was made out before us that here there was no contract at all, and if the case had turned upon that question alone I should say that no property had passed. But that is not the only question. There may be a question where, although no property had in fact passed, yet the true owner has allowed another person to hold himself out as the owner in such a way as to make an innocent person enter into a contract, which contract being performed cannot be set aside. The case of *Kingsford* v. *Merry* (1), as to which, as I say, a considerable amount of misapprehension has existed before now, was a case in which, in truth, there was neither a holding out nor was there, in fact, a contract. Whatever the true facts of the case may have been, the Court of

(1) 1 H. & N. 503.

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Exchequer, which tried the case in the first instance, was under the belief that the question before the Court was whether or not a contract obtained by fraud until disaffirmed was capable of giving a good title to an innocent holder for value; and upon that ground the case in the Court of Exchequer was decided. It is within my own knowledge that more than one member of the Court of Exchequer complained that after they had given a decision upon that hypothesis the parties, upon the case going up to appeal, agreed to a statement of facts which did not represent the facts in evidence before them. The matter when fought before the Court of Exchequer was, of course, upon the facts as proved at the trial. The question as it came before the Court of Exchequer Chamber was upon a statement of facts in writing agreed upon between the parties. Now, let us see what was the ratio decidendi of the Court of Exchequer Chamber. The Court of Exchequer Chamber said: "The judgment of the Court of Exchequer appears to have been founded upon the assumption that the plaintiffs would have been warranted, by the circumstances stated in the case, in treating the transaction between them and Anderson as a contract of sale which by reason of the fraud of Anderson they might disaffirm, if they please, or affirm, and proceed as for goods sold and delivered, but that their right to disaffirm was subject to any intermediate right which a bonâ fide vendee or pawnee from Anderson might acquire. We are, however, of opinion that upon the facts stated in the case, the plaintiffs and Anderson never did stand in the relation of vendor or vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm. It is stated in the evidence set out in the case, that the plaintiffs gave the delivery order to Anderson and dealt with him as they did, not as purchasing the goods from them, but as having purchased them from Leask as falsely represented by him, giving him credit as a sub-contractor by purchase from the contractor with them. There was no privity of contract between them and Anderson, and it was only as representing himself, as claiming under Leask, that they gave him by the delivery order the means of possessing the goods. Such a delivery, under the circumstances of this case, would no more pass the property in the

goods, than a delivery to an agent or servant of Leask would pass the property to such agent or servant. But upon the facts it appears that Anderson had no authority from Leask to receive, but only to inspect the goods, and that Anderson obtained the transfer to himself without authority and by false pretences, and mere possession with no further indicia of title than a delivery order is not sufficient to entitle a bonâ fide pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover."

It is manifest that if these were the facts which the Court of Exchequer Chamber assumed as the basis of their judgment, no relation between these parties existed at all, any more than in the case of a person who might have stolen a delivery order and presented it at the proper office. But it is remarkable to observe that in giving that judgment, and upon the argument in that case, it is expressly distinguished from those cases in which a person has given the indicia of title to another so as to enable him to pass as the true owner; and a long line of authorities, of which I have only selected two, establishes conclusively that where that is the case it is no longer a question of affirming or disaffirming any contract between the owner of the goods, but a question whether the owner of the goods has by his conduct allowed the person who has either cheated him or to whom he has intrusted goods to hold himself out as the owner so as to give a good title to a bonâ fide purchaser for value. In *Williams* v. *Barton* (1), Best C.J., after dealing with the facts of that case, which are not material to my purpose, and after speaking of the power of obtaining a good title in market overt, says: "This exception in our law proves that if a person acquires the possession of property in any mode, other than that of sale in market overt, he cannot keep it against the owner; it proves at the same time, that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property, as if it were his own." And again, in *Dyer* v. *Pearson* (2), Abbott C.J. says, referring to the case before him: "We all think that there ought to be a new trial in this case. The question which I left

(1) 3 Bing. 139.

(2) 3 B. & C. 38.

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to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is, that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exception to that rule, namely, the case of sales in market overt. This was not a sale in market overt and therefore does not fall within the exception. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspicious purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs; or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then perhaps, a sale by such a person would bind the true owner."

Now, I have thought it right to deal here as if the only parties to this question were the true owner of the goods and the purchaser for value. The question, of course, arises here in a different form, although perhaps only circuitously. Here the warehouse-keeper has been induced to attorn to the ownership of the fraudulent person Fletcher, and in that character to transfer to Fletcher and to Fletcher's order the property intrusted to his charge; and I am of opinion that it would be impossible for him to resist an action by the person to whose title he has attorned if no other question existed in the case.

This is an action in which it is admitted that the warehouse-keeper is acting under the indemnity of Grey & Co., and I have thought it right to trace the question up to its source, and to treat Grey & Co., the true owners, as the persons who are the practical defendants in this case. Treating Grey & Co. as the defendants in this case, I am of opinion that upon these facts they have no answer. The real truth is that Grey & Co. are the persons who have permitted this fraud to be committed, by intrusting the goods to the order and disposition of Fletcher; and apart from the authorities to which I have already referred, I think that it is not undesirable to refer to an American

authority, which, I observe, was quoted in the case of *Kingsford* v. *Merry* (1), *Root* v. *French* (2), in which, in the Supreme Court of New York, Savage C.J. makes observations which seem to me to be well worthy of consideration. Speaking of a bonâ fide purchaser who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests."

It appears to me, therefore, that when once the correspondence is looked at upon which these goods were committed to Fletcher, to his order and disposition, and Fletcher was invested with a full power of disposition, it is impossible to argue that this was not a holding out, by the true owner of the goods, of Fletcher as capable of giving a good title. It is admitted that the present plaintiffs dealt bonâ fide with the person who was thus in the complete dominion of the property in question, and was, under these circumstances, and from this correspondence, held out by the true owners of the goods as the owner, and with whom therefore any contract made innocently by a bonâ fide purchaser for value would be protected.

That brings me to the only remaining question, namely, the question of damages; and I confess I am wholly unable to understand the mode in which these damages were assessed. If I am right in the conclusion at which I have arrived, the truth is that the plaintiffs here were entitled to the market value of the goods. It is immaterial in what form the payment was made. If I were to go into that question I should say that the extinguishment of Fletcher's debt and the return of his cheque would be an ample consideration; but I protest against being involved in any such inquiry. These goods were under these circumstances the goods of the plaintiffs. They ought to have been delivered, and were refused. That is a conversion

(1) 1 H. & N. 503. (2) 13 Wend. 570, and see Kent's Comm. ii. 514.

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of those goods; and it appears to me, therefore, that the ordinary rule of law applies, that the plaintiffs complaining of conversion of their goods are entitled to the market value of those goods at the time of the conversion. For these reasons, I am of opinion that upon the plaintiffs' appeal the verdict should be increased to the sum claimed by them as the market value, namely, 215*l.* 12*s.* 6*d.*, and that the defendant's cross-appeal should be dismissed with costs.

LINDLEY L.J. In this case a Liverpool sugar merchant, named Grey had 150 bags of sugar belonging to him warehoused in his name in the defendant's warehouse at Goole. On June 6, 1894, Grey was induced by the fraud of one Fletcher to authorize the defendant to hold these bags of sugar according to Fletcher's order. On the same day Fletcher agreed to sell them to the plaintiffs; but before the plaintiffs paid him for them they insisted on having them transferred into their own name. This was done on June 7, and the defendant informed the plaintiffs that he held the sugar at the plaintiffs' order and disposal. Thereupon the plaintiffs paid Fletcher for the goods. Grey afterwards discovered that he had been defrauded, and he gave notice to the defendant not to part with the bags of sugar. The defendant, being indemnified by Grey, has refused to deliver them to the plaintiffs, whereupon they bring this action to recover their value. The defendant defends this action for and on behalf of Grey. Cave J. has decided that the plaintiffs are entitled to recover damages for the non-delivery of the sugar. For reasons, however, which he gave he refused to allow the plaintiffs the market value of the sugar. Hence the plaintiffs have appealed, and they contend that they are entitled to the market value of the sugar. The defendant has also appealed, upon the ground that the plaintiffs were not entitled to the sugar. It will be convenient to dispose of the defendant's appeal first. He contends—(1.) that he is not estopped from setting up Grey's title; and (2.) that his title is better than that of the plaintiffs. I am of opinion that the defendant is wrong upon the first point, even if he is right on the second. The distinct attornment by the defendant to the plaintiffs on June 7,

1894, clearly, in my opinion, estopped the defendant from denying the plaintiffs' title. The cases cited by Mr. Forbes, beginning with *Stonard* v. *Dunkin* (1) and ending with *Knights* v. *Wiffen* (2), are conclusive on this point, and any other decision would be most mischievous in a business point of view. Mr. Pickford, in his very able argument for the defendant, urged that *Attenborough* v. *London and St. Katharine's Dock Co.* (3) was an authority to shew that there was no estoppel in this case. But there the defendants had not attorned to the plaintiffs, and the attornment makes all the difference. With respect to the second point there is more difficulty. If there were no estoppel, and the Court had to decide whether Grey or the plaintiffs had the better title to these 150 bags of sugar, my judgment would be in favour of the plaintiffs, if it were not for the case of *Kingsford* v. *Merry*. (4) The case stands thus: Grey authorized the defendant, his agent, to hold the sugar to Fletcher's order, and, before that authority was revoked, the defendant acted upon it, and transferred the sugar to the plaintiffs, who are bonâ fide purchasers of it for value from Fletcher, without notice of anything wrong. It seems to me that, whether Fletcher was the owner of the goods or not, still, as he was expressly authorized to dispose of them, it would be contrary to principle to hold that Grey could recover the sugar from the plaintiffs. But Mr. Pickford cited *Kingsford* v. *Merry* (4) to shew that Grey could do so. I have looked carefully through the report of that case. An order was there given by the plaintiffs to their warehouseman in substance like the order given by Grey to the defendant on June 6 in this case. I understand that this order comprised the goods sued for. I also understand that this order was acted upon by the warehouseman before it was revoked, just as was the case here. He had transferred the goods into the name of the defendant, who was a bonâ fide pledgee for value from the person whose orders were to be obeyed. The decision of the Court was, nevertheless, in the plaintiffs' favour, on the ground that no property passed from the plaintiffs to the person to whom they gave the delivery order, and that, no property having passed to

(1) 2 Camp. 344.
(2) Law Rep. 5 Q. B. 660.
(3) 3 C. P. D. 450.
(4) 1 H. & N. 503.

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him, he could confer none on the defendant. The case was treated as if it were the case of a sale of goods by a person who had obtained possession of them by false pretences. Such a person, having no title, can confer none, except by sale in market overt: see *Cundy* v. *Lindsay*. (1) I confess I find great difficulty in distinguishing the facts of *Kingsford* v. *Merry* (2) from the facts of this case, although I think too little attention was paid to the authority given and acted upon before it was revoked. But perhaps the order to which I have referred did not include the goods sued for. On the ground, however, of estoppel by attornment the defendant's appeal must be dismissed with costs. As regards the damages, I am unable to adopt the view taken by Cave J. The value of the 150 bags of sugar was 215*l*. Fletcher sold to the plaintiffs other sugars, and the price of the whole came to a little over 300*l*. Fletcher was indebted to the plaintiffs on other transactions, and they held a dishonoured cheque of his. Instead, therefore, of paying Fletcher 300*l*. odd, the plaintiffs deducted the amount of the dishonoured cheque and paid Fletcher the balance—167*l*. odd. Cave J. has deducted the price of the other sugars from this sum, and has given the plaintiffs only 67*l*. But, if he went into these calculations at all, he should have deducted the price of the other sugars from the 300*l*. odd, and not from the 167*l*. odd. If this had been done the judgment would have been for 200*l*. odd, and the plaintiffs would, no doubt, have been satisfied. In my opinion, however, the defendant being estopped from denying the plaintiffs' title, this action ought to be treated as an action to recover the value of goods belonging to the plaintiffs. The ordinary rule ought, therefore, to be adopted, and the proper measure of damages is the market value of the 150 bags of sugar at the time of their wrongful conversion by the defendant. This value is 215*l*., and the judgment ought to be for this sum, and the plaintiffs must have the costs of their appeal.

A. L. SMITH L.J. These are cross-appeals—by the defendant to have judgment entered for him—by the plaintiffs to have the damages awarded increased. The plaintiffs are sugar merchants,

(1) 3 App. Cas. 459. (2) 1 H. & N. 503.

and the defendant is a warehouseman at Hull and Goole, and in order to bring out clearly the point raised it appears to me that it will be convenient to treat the action as an old action of trover to recover damages for the conversion of 150 bags of R. A. V. sugar, to which the defendant has pleaded not guilty and not possessed. The material facts lie in a small compass. [The Lord Justice stated the facts, and continued :—]

The first question which arises is whether the defendant is estopped from denying what he traverses by his plea of not possessed, namely, the plaintiffs' right to possession of the 150 bags as against the defendant at the date of the refusal to deliver. It appears to me that if he is, the defendant's appeal to have judgment entered for him fails, and, subject to a point upon the damages, the judgment for the plaintiffs must stand. The principle upon which an estoppel in pais is created is laid down in the well-known cases of *Pickard* v. *Sears* (1), *Freeman* v. *Cooke* (2), and *Cornish* v. *Abington* (3), and need not be stated here, for it is familiar to all lawyers. It is upon this principle that many warehousemen in like circumstances to those of the defendant have found themselves estopped from denying the plaintiff's title, and from setting up a title in a third person, and, as examples, I will take the cases of *Stonard* v. *Dunkin* (4); *Hawes* v. *Watson* (5); *Gosling* v. *Birnie* (6), in which Tindal C.J. stated "the defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted from the law." The admission in the present case, namely, the statement by the defendant that he held the sugar at the plaintiffs' order and disposal, is certainly no less strong than in *Gosling* v. *Birnie* (6); and, lastly, the case of *Knights* v. *Wiffen* (7), in which the principle upon which an estoppel in pais arises is again enunciated, and it is again pointed out how it applies. To get rid of these authorities, which, in my opinion, are conclusive in the plaintiffs' favour, Mr. Pickford, in an excellent argument for the defendant, suggested that as they were mostly cases prior to the case of *Biddle* v. *Bond* (8), in which it

(1) 6 A. & E. 469.
(2) 2 Ex. 654.
(3) 4 H. & N. 549.
(4) 2 Camp. 344.
(5) 2 B. & C. 540.
(6) 7 Bing. 339.
(7) Law Rep. 5 Q. B. 660.
(8) 6 B. & S. 225.

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was held that the estoppel against a bailee from disputing the title of his bailor and setting up a jus tertii ceases when the bailment is determined by what is equivalent to an eviction, the above cases were no longer law. But this is not so; for Blackburn J., who delivered the judgment of the Court in *Biddle* v. *Bond* (1), took care to state that the Court in no way questioned those cases, and that learned judge pointed out at the same time in such clear language what those cases had decided that I will repeat what he said. He said: "Several cases were cited on the argument at the bar, and more might have been cited, such as *Stonard* v. *Dunkin* (2), *Gosling* v. *Birnie* (3), *Hawes* v. *Watson* (4), in which a bailee, who by attorning to a purchaser of goods in effect represented to him that the property has passed to him (though such was not the fact), and thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided." It was next argued that, if this were not so, the case of *Attenborough* v. *London and St. Katharine's Dock Co.* (5) had overruled them. This case when looked at will be seen to fall short of any attornment by the bailee to the bailor. All that had taken place was that the dock company had issued warrants making the wine deliverable to Dolaro or his assigns; there was no statement that they would hold the wine to his order and disposal or its equivalent. This case leaves untouched the cases above referred to, and consequently the authorities are clear that in the circumstances of this case the defendant is estopped from denying the plaintiffs' right to the possession of the 150 bags of sugar at the date of the defendant's refusal to deliver to the plaintiffs, and from attempting to set up the title of Grey & Co. Both the pleas, therefore, of not guilty and not possessed are disproved. This being so, and the action being undefended, in my judgment it follows that the plaintiffs are entitled to the market value of the 150 bags of

(1) 6 B. & S. 225.
(2) 2 Camp. 344.
(3) 7 Bing. 339.
(4) 2 B. & C. 540.
(5) 3 C. P. D. 450.

sugar at the date of refusal to deliver, which is 300*l.*, less the 100*l.* of sugar actually delivered, i.e., 200*l.* I do not propose to discuss the point so much argued at the bar, as to whether Messrs. Grey & Co., after their order of June 6, 1894, could or could not set up title to the 150 bags of sugar, for, in my judgment, as the estoppel point is clear, it is immaterial whether they could do so or not. My brother Cave came to the conclusion that the plaintiffs were entitled to 67*l.*, and no more. He appears to have thought that the plaintiffs were only entitled to damages which resulted from the representation made by the defendant to them, and he proceeded thus: "The plaintiffs had in their pockets 167*l.* when the representation was made, and upon the faith of that representation they parted with this money; they have received 100*l.* worth of sugar against their 167*l.* Therefore, their damages are 67*l.*, the debt of Fletcher to them never being worth anything." I cannot agree in this. I would point out that this is not and never could have been an action for damages founded upon misrepresentation, for the defendant's certainly was not fraudulent. The action is, as I began with, founded on trover and nothing else. The plaintiffs succeed in that action, it is true, upon an estoppel by misrepresentation; but the action in which they succeed is none the less an action of trover, and, consequently, the measure of damages is, as I have above stated, the market value of the goods at the time of the refusal to deliver, which works out at about 200*l.*, after giving credit for the sugar received, i.e., 100*l.* For the above reasons the defendant's appeal fails, and must be dismissed with costs. The plaintiffs' cross-appeal as to damages succeeds, and must be allowed with costs, and judgment must be entered for the plaintiffs for 215*l.* 12*s.* 6*d.*, which is the proper amount when the figures are worked out.

Defendant's appeal dismissed; plaintiffs' cross-appeal allowed.

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendant: *Wynne, Holmes, & Wynne, for Simpson, North, Harley, & Birkett, Liverpool.*

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[IN THE COURT OF APPEAL.]

SCHOLFIELD *v.* THE EARL OF LONDESBOROUGH.

Bill of Exchange—Alteration—Duty of Acceptor—Negligence—Accepting Bill which gives Facilities for Alteration—Stamp of larger amount than necessary—Estoppel—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-s.* 1.

A bill of exchange for 500*l.* was, after acceptance, fraudulently altered by the drawer into a bill for 3500*l.* The stamp upon the bill was sufficient to cover the larger amount, and the bill when accepted had spaces on the face of it in which the words and figures necessary for the alteration were afterwards written by the drawer. In an action by a holder for value against the acceptor to recover the full amount of the bill:—

Held, by Lord Esher M.R. and Rigby L.J., that the acceptor of a bill owes no duty to the drawer, or any one taking the bill, other than to pay the bill on presentment, and that therefore the defendant, even if he was negligent in accepting the bill in the form in which it was presented for acceptance, was not estopped thereby from setting up the true facts, and was not liable on the bill otherwise than according to its original tenour:

Held, also, that the acceptance of the bill in the form in which it was presented was not evidence of negligence on the part of the acceptor:

Held, also, that even if the acceptor was negligent, the forgery and not the negligence was the proximate cause of the plaintiff's loss:

Held, by Lopes L.J. dissenting, that the acceptor of a bill owes a duty to subsequent holders of the bill to take reasonable precautions against fraudulent alteration; that the act of the defendant in accepting the bill, in the form in which it then was, was a breach of that duty and an act of negligence; that such negligence was the proximate cause of the belief of the plaintiff that the bill was good for the larger amount; and that, therefore, the defendant was liable for the full amount of the bill.

Young v. *Grote* (4 Bing. 253) considered.

APPEAL from a judgment of Charles J., at the trial without a jury. (1)

The action was brought to recover from the defendant 3500*l.* on a bill of exchange drawn by one Sanders upon and accepted by the defendant. The plaintiff was a holder of the bill in good faith and for value. It was admitted that when the defendant accepted the bill it was for 500*l.* only, and that afterwards, before indorsement, it had been fraudulently altered by the drawer into a bill for 3500*l.* The bill was dated London, September 8, 1890, and bore a stamp of an amount sufficient to

(1) [1894] 2 Q. B. 660.

cover a sum of 4000*l.* In the left-hand corner were, at the time of the acceptance, the figures 500, preceded by the sign for pounds (£). Between the sign for pounds and the figures was a space wide enough to admit of another figure being interpolated, and in this space Sanders inserted the figure "3." The body of the bill was in three lines. On the first were the words "Three months after date," on the second the words "Pay to me or my order the sum of," and on the third the words "Five hundred pounds for value received." After the word "of" in the second line there was a space, and in that space Sanders wrote the word "Three." Before the word "Five" in the third line there was also a space, and in that Sanders wrote the word "thousand," the space being sufficient to admit of his so doing without carrying the commencement of the third line farther to the left than that of the second. Sanders having thus altered the bill indorsed it, and it came into the hands of the plaintiff. The learned judge came to the conclusion that a person who signs a negotiable instrument with the intention that it shall be delivered to a series of holders incurs a duty to those who take the bill, note, or cheque, not to be guilty of negligence with reference to the form of the instrument; but he considered that there was no evidence of a breach of that duty on the part of the defendant, and that he was not liable for the amount of the altered bill, but was liable on the bill according to its original tenour, under the Bills of Exchange Act, 1882, s. 64, sub-s. 1. This sum had been paid into Court by way of alternative defence, and the learned judge accordingly gave judgment for the defendant. (1) The plaintiff appealed.

Dec. 11. *Finlay, Q.C.*, and *E. Morten*, for the plaintiff. It is contended firstly that there is a duty cast by the law merchant on a person putting his name to a negotiable instrument, towards a person who may become a bonâ fide holder for value, not to be guilty of negligence by putting his name to an instrument in such a state as to facilitate or invite a forgery. See per Blackburn J. in *Swan* v. *North British Australasian Co.* (2) Secondly, it is contended that there was negligence in the

(1) [1894] 2 Q. B. 660. (2) 2 H. & C. 175, at p. 182.

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present case which caused the fraud, and the defendant is thereby estopped from denying that he signed the bill as indorsed to the plaintiff. Cases such as *Bank of Ireland* v. *Trustees of Evans' Charities* (1) and *Mayor of the Staple of England* v. *Bank of England* (2) are not in point because they are not cases of negotiable instruments. The case of *Baxendale* v. *Bennett* (3) and cases of that description are distinguishable, for they turn on the fact that there had been no issue of the negotiable instrument, which had been stolen or lost without negligence. *Young* v. *Grote* (4) and *Ingham* v. *Primrose* (5) are authorities in the plaintiff's favour. [They also cited *Ex parte Swan* (6); *Marston* v. *Allen* (7); *Schultz* v. *Astley* (8); *Robarts* v. *Tucker* (9); *Arnold* v. *Cheque Bank* (10); *Halifax Union* v. *Wheelwright* (11); *Société Générale* v. *Metropolitan Bank, Limited* (12); Bills of Exchange Act, 1882, s. 21; *Bank of England* v. *Vagliano Brothers.* (13)]

The defendant was guilty of negligence in respect of three matters in concurrence, namely, the excessive stamp, the spaces before the words "Five hundred," and that between the £ and the figure 5. A bill drawn as this was cannot be said to have been drawn in the ordinary business form, and such a divergence from the ordinary form ought to have attracted the defendant's attention. Of two innocent persons the defendant whose conduct has conduced to the forgery ought to bear the loss.

Jelf, Q.C., and *A. T. Lawrence*, (*C. K. Francis*, with them), for the defendant. The contention for the plaintiff is an attempt to extend the law beyond anything that has hitherto been suggested. At common law a bill altered as this was became void. The proviso to the Bills of Exchange Act, 1882, s. 64, modifies the common law in that respect, and provides that, where the alteration is not apparent, a holder in due course may avail himself of the bill as if it had not been altered and enforce

(1) 5 H. L. C. 389.
(2) 21 Q. B. D. 160.
(3) 3 Q. B. D. 525.
(4) 4 Bing. 253.
(5) 7 C. B. (N.S.) 82.
(6) 7 C. B. (N.S.) 400.
(7) 8 M. & W. 494.
(8) 2 Bing. N. C. 544.
(9) 16 Q. B. 560.
(10) 1 C. P. D. 578.
(11) Law Rep. 10 Ex. 183.
(12) 27 L. T. (N.S.) 849.
(13) [1891] A. C. 107.

payment of it according to its original tenour. The plaintiff seeks to introduce a far greater variation from the common law, not founded on contract or fraud or any known tort. *Young* v. *Grote* (1) stands on a totally different footing from this case. That decision is explicable upon the ordinary doctrine with regard to cases where a person signs a blank cheque and leaves it to another to fill it up. In that case the cheque never was issued till it got into the state in which it was when it was handed to the bankers. It is said that there is an estoppel. There may be an estoppel by misrepresentation, but there can be no estoppel by negligence apart from actionable negligence. In effect, though not in form, this is an action for negligence, and the plaintiff has to make out such negligence as will support the action. To do this he must shew a breach of duty and that what happened was the natural result of the negligence complained of. Here there is no duty on the part of the acceptor except to pay the bill at maturity. A drawee with funds of the drawer in his hands cannot refuse to accept because he does not approve of the form of the bill. Lord Blackburn's remarks in *Swan* v. *North British Australasian Co.* (2) have relation to the duty of a drawer of a bill of exchange to take reasonable precautions against the possibility of fraudulent alterations in it and have no relation to the duties of an acceptor. The drawer has control over the form of the bill, and there can be no duty of supervision on the part of the acceptor. If the acceptor has to exercise reasonable care in accepting a bill he cannot be expected to anticipate that a crime will be committed, and, moreover, the proximate cause of the loss which the plaintiff sustains by the fact that the bill is not worth its face value is the fact that a forgery was committed. In *Bank of Ireland* v. *Trustees of Evans' Charities* (3) it is pointed out that the negligence must be in or immediately connected with the transaction—in that case a transfer—and that the loss complained of must be the ordinary or likely result of the negligence complained of. Neither of these conditions is present in this case.

(1) 4 Bing. 253. (2) 2 H. & C. 175, at p. 183.
(3) 5 H. L. C. 389.

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Finlay, Q.C., in reply. If it be true that that there is no duty on the part of the acceptor with regard to accepting a bill which presents facilities for alteration, it must follow that he would not be liable for negligence, however gross, not even if he handed such a bill to a person who had been convicted of forgery. [He referred to *Orr* v. *Union Bank of Scotland.* (1)]

Cur. adv. vult.

1894. Dec. 19. LORD ESHER M.R. In this case an action is brought against the defendant as the alleged acceptor of a bill of exchange for 3500*l.* The defence raised is that he never accepted such a bill. It was proved at the trial that the defendant was interested in the formation of a certain club, and in the financial arrangements to carry this out, and that one Sanders was assisting him in the formation and carrying out of the club. Sanders drew on stamped paper a bill of exchange for 500*l.*, on which there were certain blank spaces, and laid the bill in that condition before the defendant for his acceptance. No other evidence was given as to what took place when this was done. Sanders was in penal servitude and was not called as a witness, and the defendant was not called, as it was not disputed that the signature was his. It was an admitted fact that when accepted the bill was for 500*l.*, and it was proved that after acceptance Sanders filled up the spaces and changed it into a bill for 3500*l.* In so doing he committed a forgery, and it is clear that he left the spaces when he drew the bill for that express purpose. The bill after acceptance was handed back to Sanders, and was negotiated and went through several hands till it reached the plaintiff, who sued upon it for the full amount of 3500*l.* If the defendant was not prevented from relying on these facts, it is clear that under the old law he would not have been liable at all on the bill, and under the existing law he would not be liable for more than the amount for which he accepted, which sum has been paid into Court. But it is said the defendant is estopped from shewing what actually happened, and that then, the bill being in the hands of an indorsee for value, the defendant will be

(1) 1 Macq. 513.

liable for the full amount. The defendant is entitled to shew what were the true facts unless there is something that estops him. The doctrine of estoppel is not applicable merely to bills of exchange—it is a doctrine of the common law; and we are thus taken beyond the authorities as to bills of exchange, and have to consider the position of the defendant having regard to the common law. It is not said that there was any direct representation made to the plaintiff either by the defendant or by any agent of his, but the estoppel is founded on the negligence of the defendant, the negligence being the acceptance of the bill with the spaces left in it, and with a stamp which was larger than was necessary for a bill of 500*l*. Negligence at common law to be actionable must be in breach of a duty, and it must be shewn that the defendant owed to the plaintiff not merely a duty, but the duty of not accepting a bill under such conditions. At the moment the bill was accepted the defendant had no legal relations with the plaintiff. What is the position of an acceptor? Before he accepts a bill there is in ordinary course a contract existing or implied that he will accept it. By the custom of merchants, when one is indebted to another and they are at a distance from one another, the latter draws on the former, who accepts the bill if it is not for an amount larger than the amount due. The contract to accept is prior to the contract made by the acceptor when he actually accepts the bill. It is not a contract that binds the drawer, but is a one-sided contract only. The person who has contracted to accept cannot sue the drawer for not drawing and sending the bills which he has bound himself to accept. The drawer is master of the form which the bill is to take, for he has to create it. A bill in ordinary mercantile course is often negotiated before it is accepted, and a first indorsee, or several, may be brought into existence before acceptance. The acceptor does not know into whose hand a bill will pass, and has no control over it. He does not even know if the bill will be negotiated, for it may be the drawer will himself present it for payment. If the bill has passed through several hands it may still, before it is presented to the acceptor, be got back or bought back by the drawer. Take these matters into consideration, and ask what is the liability of

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the acceptor. What is his promise? The moment he accepts he has promised to pay the amount for which he has accepted the bill to the person to whom the drawer has passed it. The contract, therefore, made by the acceptor contains a promise that he will pay on presentment, and there is no other duty on his part towards the drawer. Can the drawer transfer that which he has not got himself? He has the promise of the acceptor to pay and that he can transfer, but he has no undertaking by the acceptor not to accept a bill in which spaces are left. The suggestion, if the argument for the plaintiff is right, is that the drawer has a contract to which the alleged duty of the acceptor is not attached, but that he can transfer that contract with the duty attached. It seems to me that it would be a very dangerous position if an acceptor, say an acceptor abroad, could say he would not accept a bill because it had spaces left, and the bill were to be protested in consequence, and the drawer to be liable upon it to an indorsee. The position would be serious for the proposed acceptor if he declines to accept on the ground that the spaces left in the bill make it dangerous to do so and the jury take a different view. I have said what is the only duty of the acceptor, and it is stated in Pothier, in dealing with bills of exchange in paragraphs 116 and 117, where he says that the contract is unilateral, and that the only duty which arises from the contract, apart from such as arise on default in payment, is to pay the sum indicated by the bill of exchange. If there is then no duty, there is no negligence on which an action can be founded.

Suppose, however, there were a duty owing by the acceptor, it must be a duty not to accept the bill in such a form as to render a forged interpolation easy. The suggested neglect of that duty is that the acceptor ought to have anticipated that the bill would fall into the hands of a felonious person who might take advantage of the spaces, and that the acceptor should on that anticipation have put marks on the bill to fill up the spaces. Unless it can be laid down that the mere fact of leaving such spaces unfilled is conclusive evidence of negligence, it might be that on a similar state of things different juries might take different views. That, again, would be a dangerous state of things. If, however, it is a question of fact for our decision, I

am of opinion that such evidence as was given in this case is no evidence of negligence.

Suppose, however, there was both a duty and negligence, the two together do not necessarily create an estoppel, because between them and the indorsement to the holder there comes in the felonious act of Sanders. That act, and not any default of the defendant, was the immediate cause of the plaintiff's loss, and so no estoppel arises against the defendant.

A number of cases have been cited, among others *Young* v. *Grote* (1)—the fount of bad argument; but it does not apply to this case. The question arose there between a banker and his customer, and the person who was said to be negligent was the drawer of a cheque, and not the acceptor of a bill of exchange. The only way in which that case can be supported is on the ground that the customer signed a blank cheque. That is not a case of estoppel at all, for the law merchant says that any one who signs a blank cheque authorizes the person in whose hands it is to fill it up as his agent. If that is the ground of the decision it may be a right one, and that is the ground on which Parke B., in *Robarts* v. *Tucker* (2), says it may be supported; but it cannot be so on the ground given in the case itself.

Let me take a few cases in which *Young* v. *Grote* (1) has been quoted. *Swan* v. *North British Australasian Co.* (3) was a case of forged transfer and not of a cheque. Blackburn J., after referring to the rule laid down in general terms by Wilde B. in the Court below and qualifying it, referred to *Young* v. *Grote* (1), and said: "It is sufficient to point out that a party signing in blank a cheque or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment of *Freeman* v. *Cooke*. (4) He means the holder to be induced to take the instrument as if it had been filled up from the first." Those remarks are applicable to a blank cheque, but not to a cheque which is not in blank, but which has been tampered with after it has been signed.

(1) 4 Bing. 253.
(2) 16 Q. B. 560.
(3) 2 H. & C. 175.
(4) 2 Ex. 654.

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In *Baxendale* v. *Bennett* (1) there was a blank acceptance which was lost or stolen, and afterwards filled in without the authority of the drawer, and Bramwell B. pointed out that, if the defendant was liable, it could only be because he was estopped from denying that he accepted the bill sued on. He also pointed out that an estoppel "never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do." Apply that to the present case. If the defendant now says that he only accepted a bill for 500*l.*, how is he saying anything contrary to his former conduct? *Bank of Ireland* v. *Trustees of Evans' Charities* (2); *Mayor of the Staple of England* v. *Bank of England* (3), were not cases of negotiable instruments, but I cite them on the question of the law of estoppel founded on negligence. It is clear from those cases that the negligence which would estop the defendant must be proximate negligence, and not merely remote, and that is not the case here.

If the defendant is not estopped from setting up the true facts as to the bill that he signed, the case comes within s. 64 of the Bills of Exchange Act, 1882, which Act, as Lord Herschell, in *Bank of England* v. *Vagliano Brothers* (4), pointed out, is intended to be a complete codification of the law on the subject. I am of opinion that there is no estoppel, and that the defendant is bound to pay the sum for which he accepted the bill, and no more. It follows that, in my view of the case, the appeal should be dismissed.

LOPES L.J. read the following judgment. This is a case of great importance, and I regret that I cannot concur with the view taken of it by the other members of the Court. [The Lord Justice, having stated the facts, proceeded:—]

The questions which arose are these: 1. Did the defendant, the acceptor, owe any duty to the subsequent holders of the bill? 2. Was there any breach of that duty, or, in other words, was

(1) 3 Q. B. D. 525.
(2) 5 H. L. C. 389.
(3) 21 Q. B. D. 160.
(4) [1891] A. C. 107.

there such negligence by the defendant in accepting the bill, framed as it was, which disentitles him to set up its alteration in material particulars as a good answer to an action brought on the bill by a bonâ fide holder for value? 3. Was what happened the proximate cause of such breach of duty?

The principle in regard to negligence having legal consequences appears to be this: 1. There must have been a failure to exercise that care, prudence, or diligence which a man of average care, prudence, or diligence would exercise in the case. 2. And that general proposition means specifically (*a*) that the negligent person at the time must owe some duty either to the person affected by the alleged negligence, or to the public, of which he is one, and (*b*) that the result has come about in, or in immediate connection with, the negligent act or omission.

There is a subordinate question with regard to the effect of the 64th section of the Bills of Exchange Act, 1882, which I will deal with after I have disposed of the above questions.

The learned judge in the Court below held that the defendant did owe a duty to subsequent holders not to be guilty of negligence with reference to the form of the instrument; but he considered that accepting a bill in a form facilitating forgery was not enough, he must negligently so accept it, and that the defendant in this case had not been negligent.

I agree with the learned judge when he holds that the defendant did owe a duty to subsequent holders; but I disagree with him in respect of the negligence. I should have thought that accepting a bill in a form facilitating forgery was in itself strong evidence of negligence.

In considering the question of duty it is important to bear in mind that bills of exchange are a part, and a very important part, of the mercantile currency of the world; they are negotiable instruments which are intended to pass by written transfers, and are created for the purpose of readily passing from hand to hand. Happily, bills of exchange generally pass through the hands of honest people, and are seldom fraudulently dealt with. They may, however, fall into the hands of dishonest people, and by prudent people are therefore so drawn as to render any tampering with them well-nigh impossible. Crime is the exception;

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but I expect if bills were often framed as the one in this case was framed crime would be of frequent occurrence.

It would be passing strange if a person who accepts a negotiable instrument, such as a bill of exchange, and who thus permits it to go forth on the credit of his name, he being the person primarily liable to all subsequent holders, should not owe to those subsequent holders the duty of taking reasonable care that the document should be so framed, when accepted, as not to offer obvious opportunities for the commission of a crime.

If this had been res integra I should without hesitation have thought the duty contended for existed; but there is no lack of authority on the subject. If the Master of the Rolls is correct in holding that the acceptor of a bill of exchange owes no duty to subsequent holders for value, that holding means the reversal of numerous cases hitherto recognised. In *Young* v. *Grote* (1) it was assumed that the customer owed a duty to his bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care. It is true that was a case between customer and banker; but it appears to me if there was a duty there, a fortiori there must be a duty between the acceptor of a bill of exchange and subsequent holders when the instrument in question is created for the purpose of passing from hand to hand.

In *Swan* v. *North British Australasian Co.* (2), Blackburn J., speaking of *Young* v. *Grote* (1), says: "It may be that case is to be supported on some of the grounds there stated (by Williams J., in *Ex parte Swan* (3)), or upon the broader ground, apparently supported by the authority of Pothier, in the passage cited in *Young* v. *Grote* (1), that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary in this case to inquire how that may be." By which I understand the learned judge to mean that it was not necessary because they were not then dealing with negotiable instruments. But it is impossible not to see that in the case of negotiable instruments Blackburn J. thought the duty did exist.

(1) 4 Bing. 253. (2) 2 H. & C. 175, at p. 182.
(3) 7 C. B. (N.S.) 400, at p. 445.

I can find no case where it has been doubted but that a party putting into circulation a bill of exchange owes a duty to subsequent holders to take reasonable precaution against fraudulent alteration.

Baxendale v. *Bennett* (1) was a case where the defendant drew a bill without a drawer's name addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it was stolen, filled up with a drawer's name, and transferred to the plaintiff, a bonâ fide holder for value. The bill, it is to be observed, was never issued, and this may account for what Brett L.J. says at p. 532: "There must be the neglect of some duty owing to some person—here, how can the defendant be negligent who owes no duty to anybody—against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to anyone, and, secondly, he did not act otherwise than in a way which an ordinarily careful man would act." This may very well be in a case where the bill is obtained by the commission of an offence, and thus becomes circulated against the wish of the acceptor. It is very like the case of a bill being stolen in the street with violence, and subsequently being circulated. In such a case it would be difficult to say the acceptor had been wanting in any reasonable precaution or owed any duty to anybody. Bramwell L.J. does not seem to doubt the existence of a duty if the instrument had been voluntarily parted with, but founds his judgment on the fact that the bill had been obtained by the commission of a crime and against the wish of the defendant.

Ingham v. *Primrose* (2) proceeds on the ground that the acceptor owed a duty to the bonâ fide holder for value, and though the case has been severely criticised on the point of the negligence relied on, it has not, so far as I know, ever been questioned on the point of duty. The judgment of the Court was delivered by Williams J.

In *Société Générale* v. *Metropolitan Bank, Limited* (3) the duty was assumed, and I know of no case where it was ignored.

(1) 3 Q. B. D. 525. (2) 7 C. B. (N.S.) 82. (3) 27 L. T. (N.S.) 849.

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Mere carelessness, where there is no breach of duty to be careful, is not sufficient. The words of Blackburn J. in *Swan* v. *North British Australasian Co.* (1), are cited with approval by Cockburn L.C.J. in *Johnson* v. *Crédit Lyonnais Co.* (2): "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt."

I come to the conclusion, therefore, that there must be a duty, and I agree with Charles J. in holding that a person who signs a negotiable instrument with the intention that it should be delivered to a series of holders does incur a duty to those who take such negotiable instrument not to be guilty of negligence with reference to its form.

I now come to the second question, namely, assuming a duty, was there any breach of such duty—such negligence in accepting the bill in the form in which it then was, as disentitled the defendant to set up its alteration as a good answer to this action by a bonâ fide holder for value?

The negligence must be in the transaction itself. Blackburn J. so says in *Swan* v. *North British Australasian Co.* (1) Here the negligence alleged is negligence in accepting the bill in its then form, and is therefore in the transaction itself.

What is the negligence alleged against the defendant? It is accepting a bill of exchange framed in such a way as to give obvious opportunities for its alteration should it fall into the hands of a dishonest person. It is the absence of such care as a reasonable, prudent person would and ought to take when accepting a negotiable instrument. There is a stamp sufficient to cover eight times the amount for which the bill is drawn—there is a space between the £ and the 500 sufficient for the insertion of one if not two figures without any chance of detection—a most suspicious space, which in my judgment should have attracted the attention of any ordinarily prudent man; and then in the body of the instrument there are spaces, appropri-

(1) 2 H. & C. 175. (2) 3 C. P. D. 32, at p. 42.

ately left, for the insertion of any words it may suit a dishonest person to interpolate. The unaccountable early termination of the second line, and space left after the word "of," and the late commencement of the third line with the word "five," a space being left before it permitting of the insertion of a word which would make the third line start even with the second, I cannot help thinking ought to have been observed, and to have at once induced the defendant to pause before he placed his signature as acceptor to that document.

It is not only one suspicious circumstance—there is a combination of them. To hold a person accepting a bill of exchange so framed not negligent, and therefore not liable to a bonâ fide holder for value, would tend to impair the negotiability of such instruments.

This case is very like the case of *Young* v. *Grote*. (1) There the plaintiff left cheques signed in blank with his wife for her to fill them up according to her need. She filled up one so imperfectly as to enable the bearer to alter the 50*l*. for which it was given to 350*l*., and it was held that the plaintiff was estopped from setting up against the defendant, the banker, who had acted with ordinary caution in paying the cheque in the usual course of business, that his agent had only drawn the cheque for the smaller sum, inasmuch as it was his negligence through his agent that enabled the fraudulent holder to cheat the banker.

It is true this was a case between a customer and his banker; but if I am right in holding that an acceptor of a bill of exchange owes a duty to subsequent holders such as I have described, it does not seem to me that the case is not in principle as applicable to a bill as to a cheque drawn by a customer on his banker.

It was said that it was difficult to extract the principle from *Young* v. *Grote* (1), and that the authority of the case had been impaired by adverse comments at different times made with regard to it.

It may be that estoppel is not the correct legal ground upon which to rest the decision in that case. No doubt various

(1) 4 Bing. 253.

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reasons have been assigned for the conclusion arrived at. I adopt the language of Cleasby B. in *Halifax Union* v. *Wheelwright* (1), where he says: "But these various reasons for the conclusion only shew how incontestable the conclusion itself is; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default, against a person who was misled by that default without any fault of his own."

This is the principle which I have always attributed to *Young* v. *Grote* (2), and it is a principle which I consider most applicable to the case with which I am dealing, and which, if applicable, cannot be controverted.

Young v. *Grote* (2), though criticised in regard to the particular circumstances of the case, is a binding authority, has been recognised in numerous cases by judges of the highest authority, and as recently as 1891 in the House of Lords in the case of *Bank of England* v. *Vagliano.* (3)

The case of *Société Générale* v. *Metropolitan Bank, Limited* (4), was cited. The material alteration there was the adding the letter "y" after the word "eight"; it was said a space had been left sufficient to enable the "y" to be introduced, and that was negligence which enabled the parties to commit a forgery. The Court did not consider that there was sufficient proof of negligence. *Young* v. *Grote* (2) and *Ingham* v. *Primrose* (5) were referred to, but the Court thought those cases entirely different. Bovill C.J. said you cannot prevent the possibility of a person committing a forgery: "Parties cannot prevent forgeries being committed; they must use reasonable care not to afford opportunities for it"; and he then says leaving a space for a word or figure, as in the case before him, did not in his opinion amount to negligence. He says that the printed form was filled up with "eight" days, and that it was said there was negligence in

(1) Law Rep. 10 Ex. 183, at p. 192.
(2) 4 Bing. 253.
(3) [1891] A. C. 107.
(4) 27 L. T. (N.S.) 849.
(5) 7 C. B. (N.S.) 82.

allowing sufficient space for the addition of the letter "y," but that he could not, sitting as a juryman, say there was negligence enabling the forgery to be committed. He points out that this was the usual course of filling up blanks in a form, and that a man is not to assume forgery will be committed. He finds no fault with *Young* v. *Grote* (1) and *Ingham* v. *Primrose* (2), but distinguishes them from the case with which he was then dealing.

Negligence must depend on the particular circumstances of each case—it is a matter of more or less. I can quite understand that in the case of the *Société Générale* v. *Metropolitan Bank, Limited* (3), the interpolation of the letter "y" in a printed form of bill was thought insufficient evidence of negligence. It may be true that neither one of the matters relied upon in this case would alone be sufficient in itself to constitute negligence; but in their combination they act and react on one and another, and in the aggregate, in my judgment, shew such a want of reasonable care on the part of the defendant as disentitles him to set up the forgery.

It is said it is no want of reasonable care not to anticipate a forgery; but that is not in my opinion the right test. I should rather ask if it is not a want of reasonable care not to take reasonable and usual precautions against it in the case of a negotiable instrument which is to pass indiscriminately from hand to hand.

If it is suggested that the conduct of the defendant is as consistent with non-negligence as with negligence, I say it is not. Granted the burden is on the plaintiff of proving negligence, I say he has done so. If it is said the drawer Sanders may have used devices to induce the defendant to accept the bill, such as covering over the spaces with his hand, I reply that there is no such evidence, and, if there had been, such conduct ought to have aroused his suspicions. The defendant, I presume, is a man of experience, and has probably accepted many bills before.

The defendant by his want of care and caution has enabled Sanders to commit the forgery, and wherever one of two innocent

(1) 4 Bing. 253. (2) 7 C. B. (N.S.) 82.
(3) 27 L. T. (N.S.) 849.

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persons must suffer by the act of a third party, he who has enabled such person to occasion the loss must sustain it: *Halifax Union* v. *Wheelwright.* (1)

The third question is whether the breach of duty or negligence was the proximate cause of what happened, i.e., leading the plaintiff into the mistake or belief that the bill indorsed to him was for 3500*l.*

The point made was that there was the interposition of a crime, and that the crime was the proximate cause, and not the negligence of the defendant. This, in my judgment, is untenable. It might as well be said that in *Scott* v. *London and St. Katharine Docks Co.* (2), where a sack fell from a house and injured a passenger in the street through the negligence of the defendants' servants, that the sack was the proximate cause of the injury and not the negligence. Parke B., in the case of *Bank of Ireland* v. *Evans' Trustees* (3), draws the distinction between direct and remote negligence. In effect, where the intervention of the new cause is the result that might be anticipated from the particular negligence in the case, then the negligent person would be liable to answer for the neglect; but where the result is not the "necessary or ordinary or likely result of that negligence," then the loss must lie where it falls according to the general principle of law. Here the forgery is the result to be anticipated from the alleged negligence, and therefore the negligent party, i.e., the defendant, must answer for the neglect.

In *Young* v. *Grote* (4), *Ingham* v. *Primrose* (5), and *Société Générale* v. *Metropolitan Bank* (6), in all which cases crimes were interposed, it was not held nor suggested that the neglect was not the proximate cause. The only other point is that arising under the 64th section of the Bills of Exchange Act, 1882. That section has no application to this case, so far as the 3000*l.* is concerned. Before the Act a material alteration was a complete defence, by whomsoever made, and avoided and discharged the bill, except as against a party who made or who assented to the alteration. Now, under the proviso to section 64, a holder for

(1) Law Rep. 10 Ex. 183.
(2) 3 H. & C. 596.
(3) 5 H. L. C. 389.
(4) 4 Bing. 253.
(5) 7 C. B. (N.S.) 82.
(6) 27 L. T. (N.S.) 849.

value may, when a bill has been materially altered, but the alteration is not apparent, avail himself of the bill as if it had not been altered, and it was under this proviso that Charles J. held that the defendant was liable to pay the plaintiff 500*l.*, although he did not consider there was any negligence entitling the plaintiff to recover the whole amount of the altered bill.

I agree with Charles J. on the stamp objection.

For the reasons given, agreeing with Charles J. on the question of duty, but disagreeing with him on the question of negligence, I am of opinion judgment should be entered for the plaintiff for 3500*l.*

RIGBY L.J. There are two questions in this case—one of fact, and the other of law. The former is the question of negligence, and the latter of duty. I agree with the Master of the Rolls on both points. As I have little to say on the question of negligence, I think it would be more convenient to give my judgment on the facts first. Either question, if answered in a particular way, is sufficient to dispose of the case; but, as both have been argued fully, I desire to state my opinion on both.

If in a case that turns on a question of negligence, the evidence leaves the matter in doubt, those who set up the negligence must fail, for it is not sufficient to shew only that the state of facts is consistent with negligence. In this case we have no evidence of the circumstances under which the defendant's acceptance was obtained. This much, however, is clear, that Sanders arranged matters beforehand to enable him to commit a fraud, and it is probable that he would use means for concealing the intended fraud. I should infer that he would adopt some device for closing the defendant's eyes to the imperfections of the bill. The state of the evidence makes it impossible, in my view, to say that the plaintiff has proved negligence.

I pass from the question of negligence to consider the duty that is set up. The duty as formulated is one not, in accepting the bill, to facilitate fraud. This is a difficult proposition to deal with. What is a duty not to facilitate fraud? If such a duty exists, it must of necessity be limited to a duty not to facilitate a particular kind of fraud. To illustrate my meaning,

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I may point out that any one who accepts a bill payable to order does in one sense an act which facilitates fraud, for any one into whose hands the bill may get can commit a forgery in regard to indorsements. There is no great difficulty in so doing, and I do not see, if the duty as formulated exists to its full extent, why it should not apply to the case I have suggested.

In an action founded on negligence the negligence complained of must be the proximate, or, as I should prefer to say, the direct or immediate cause of the loss. What is the direct or immediate cause of loss in a case of forgery? It is the crime but for which no one would have been deceived. Here Sanders undoubtedly prepared for and executed the fraud; but if he had been an honest man, and had negotiated the bill in its unaltered condition, a subsequent indorser might have committed a forgery, and the ultimate holder would have been deceived. It would be difficult to say that when the bill comes ultimately into the hands of a rogue, his crime is the direct consequence of some act of the acceptor. Unless this can be said, the suggested duty of the acceptor does not apply to such a state of things. I cannot think that it is correct to call that a principle which does not apply to the majority of cases, and I fail to see a duty to prevent a particular kind of fraud when the door is open to other kinds of fraud which cannot be prevented.

It is said that the duty is to be found in the law merchant. If so, I should expect to find it in the Bills of Exchange Act, 1882. I am aware that s. 97 of that Act provides that "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques"; but that provision cannot, in my judgment, refer to so far-reaching a principle as that it is the duty of an acceptor to provide against possible crime. I find that the question of the alteration of bills is dealt with, and, so far as the law merchant is concerned, I should say completely dealt with, in s. 64 of the Act.

The provisions of s. 64 of the Act do not prevent the application of the doctrine of estoppel, for that doctrine is outside the Act. Upon this question of estoppel it is necessary to refer

to *Young* v. *Grote*. (1) That case has been frequently considered but has not been overruled. It was a special case, and the arbitrator found that the plaintiff had been negligent, whereby the defendant, who was his banker, had been misled into paying a cheque. The plaintiff delivered to his wife signed cheques with blanks for her to fill up, and she allowed one to be filled up in such a manner that the sum named could be altered, and after it was so altered the larger amount was paid by the banker, and it was held that the loss must fall on the customer. The important fact which has been referred to by judges who have commented on the case as possibly justifying the decision is that the cheque was drawn in blank by the plaintiff, and left to be filled up by the person in whose hands it was as his agent. Parke B., in *Robarts* v. *Tucker* (2), pointed out that the customer, by signing a blank cheque, might be considered to have given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. Such a decision is no authority with reference to the suggested duty of an acceptor of a bill of exchange which may pass through the hands of numerous indorsees.

I may say that I cannot agree with the view presented in argument as to the meaning of Lord Blackburn's observations in *Swan* v. *North British Australasian Co.* (3), for the learned judge, while suggesting various grounds on which the decision in *Young* v. *Grote* (1) might be supported, refrains from giving his sanction to any one of them. Pothier, in his Traité du Contrat de Change, nos. 99, 100, was confining his attention to the case of principal and agent, with special reference to the relation of banker and customer, and there is nothing to shew that he would have extended his reasoning to cases other than that which he was considering. He mentions the view put forward by Scacchia that a banker who pays a bill which has been falsified by the holder, by alteration to a larger amount, in a manner that might deceive an intelligent person, has a remedy against the drawer, to recover the amount paid in excess; but he did not accept this view without qualification. He says the mandator ought to repay

(1) 4 Bing. 253. (2) 16 Q. B. 560.

(3) 2 H. & C. 175.

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the mandatory moneys properly expended by the latter "ex causa mandati," that is, for the purpose of executing the mandate, but not expenses incurred "non ex causa mandati sed tantum occasione mandati," and of this he gives an example. He then points out that these principles would naturally apply to the case of a banker deceived by an alteration in the amount of the bill into paying a larger sum than that for which it was drawn. Such a payment is not made ex causa mandati, but only ex occasione mandati, unless the banker has been misled by the fault of the drawer into paying the larger sum. If the principal has done something that naturally misleads his agent into paying too large a sum, the principal is liable to refund the excess to his agent. How can the law applicable as between principal and agent be applied to the case of a bill which passes through the hands of many persons, between whom and the acceptor there is no such relation? I am not satisfied that the learned judges who in subsequent cases were considering that decision would have arrived at the same conclusion on the facts as was arrived at by the Court in that case. I think there must be some vice in the reasoning of the learned judges in *Young* v. *Grote* (1), for it is not confined to the case of principal and agent, but would seem to indicate that it is the duty of the drawer of a cheque, or the acceptor of a bill of exchange, to consider generally the possibility of a fraud being committed, and to take precautions accordingly. This not being, as I have pointed out, a general principle, cannot, in my opinion, be a sound one, and in so far as *Young* v. *Grote* (1) may be taken to lay it down, I think we should decline to follow that case.

For these reasons I agree with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Smith, Fawdon, & Low.*

Solicitors for defendant: *Saltwell, Tryon, & Saltwell.*

(1) 4 Bing. 253.

A. M.

GWILLIAM *v.* TWIST AND ANOTHER. 1895 *Jan.* 30, 31.

Master and Servant—Extent of Servant's Authority—Sudden Emergency—Implied Authority to employ Substitute.

A servant has an implied authority in cases of sudden emergency to appoint another person to act as a servant on his master's behalf.

While the defendants' omnibus was being driven by the defendants' servant, a policeman, being of opinion that the driver was drunk, ordered him to discontinue driving. The driver and the conductor of the omnibus thereupon authorized a third person, who happened to be passing by, to drive the omnibus home on their masters' behalf. That person while so driving the omnibus home negligently drove over the plaintiff and injured him :—

Held, that the defendants were liable.

APPEAL from county court of Birmingham.

The defendants were the proprietors of an omnibus which was being driven through the streets of Birmingham by a man named Harrison, a driver in the employment of the defendants. A police inspector, being of opinion that Harrison was too drunk to drive the omnibus with safety, ordered him to get down and discontinue driving it, which he did. The omnibus was at that time about a quarter of a mile from the defendants' yard. A man named Veares, who had formerly been a conductor in the defendants' employment, and who happened to be passing by, volunteered to drive, and, with the acquiescence of Harrison and of the defendants' conductor, proceeded to drive the omnibus home. While on his way he negligently drove over the plaintiff, who was a passenger in the street. The county court judge held that as it was necessary that some one should drive the omnibus home it was under the circumstances within the scope of the authority of Harrison and the conductor to authorize Veares to drive, that they did in fact authorize him to drive on behalf of the defendants, and that the defendants were consequently liable. He was also of opinion that, apart from any authorization by the defendants' servants, Veares might be regarded as an agent of necessity, and that for his negligence in the course of such agency the defendants were equally responsible. The defendants appealed.

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Ernest Pollock, for the defendants. A servant can under no circumstances, not even of the greatest necessity, have any implied authority to delegate his agency to another. The judge referred in support of his view to a passage in Smith on Negligence, 2nd ed. at p. 82, where it said that in certain cases an authority to a servant to employ an underservant may be implied. The only English decision cited in support of that proposition is *Booth* v. *Mister* (1), where the defendant, the owner of a cart, was held liable for the negligent driving of it by a stranger to whom the reins had been entrusted by the defendant's servant; but there the defendant's servant was sitting by the stranger in the cart, and the cart was none the less being driven by him because the reins were in another person's hands. But further, even supposing that an authority to employ a sub-agent is to be implied in cases of necessity, there was no necessity here, for the omnibus was only a quarter of a mile from home, and for that distance the horses might have been led instead of driven. Upon the other point, as to Veares being an agent of necessity apart from any authorization by Harrison, the judge relied upon a passage in Story on Agency, where, after saying that "although the powers of agents are ordinarily limited to particular Acts, yet extraordinary emergencies may arise in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers" (sect. 141), he goes on to say: "The same doctrine would seem to apply to the case of a mere stranger, acting for the principal without any authority, under circumstances of positive necessity" (sect. 142). But it is submitted that the proposition there stated is not law, and that even if an absolute necessity were shewn in the present case the defendants could not be held liable on that ground.

Houghton, for the plaintiff. The defendants' driver, Harrison, being unable to drive himself, had implied authority to employ a substitute to drive for him. The suggested alternative of leading the horses was not a reasonable one to take. The defendants are also liable on another ground, namely, that the accident to the plaintiff was the legal consequence of Harrison's misconduct in getting drunk. In *Illidge* v. *Goodwin* (2) it is

(1) 7 C. & P. 66.

(2) 5 C. & P. 190.

stated in the head-note that if a horse and cart are left unattended in the street, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by in striking the horse. If, therefore, Veares had driven without any authority from Harrison, the defendants would have been liable upon the principle of that case. The additional fact that Harrison authorized the driving cannot diminish the defendants' responsibility.

Ernest Pollock, in reply. The misconduct of Harrison in getting drunk is too remote to be regarded as the legal cause of the injury. The head-note in *Illidge* v. *Goodwin* (1) is a note, not of a decision, but of a mere obiter dictum, the jury having stated that they did not believe the horse had ever been struck by a passer-by at all (see p. 192). And that dictum is not good law.

LAWRANCE J. The question is whether Harrison and the conductor, by acquiescing in Veares driving the omnibus, constituted Veares the servant of the defendants, so as to render the defendants liable for the accident which happened while he was so driving. The judge held that, if they had the power to do so, they must be taken to have authorized Veares to drive on the defendants' behalf. Then, had they the power to do so? In the absence of an express authority in that behalf, is an authority to employ Veares to be implied? I think that, having regard to the necessity which the judge apparently found as a fact to have arisen, such an authority must be implied. The judgment must therefore be affirmed.

WRIGHT J. This case raises a very serious question of law, upon which, so far as I am aware, there is little or no authority. The view, however, which I take upon the matter is this. I think that in cases of sudden emergency a servant has an implied authority from his employer to act in good faith according to the best of his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of his authority, and must not act in a manner which is plainly

(1) 5 C. & P. 190.

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unreasonable. And in cases to which this doctrine applies I think the servant must be regarded as not the less acting within the scope of his employment because his judgment happens to be mistaken and wrong. Of course a servant cannot have any implied authority to do on behalf of his master any act which it would be illegal for the master to do himself; for instance, if there had been a statute or bye-law applying to these omnibuses, making it illegal to employ an unlicensed person to drive them, I think the defendants' servants would not, however great the emergency was, have been acting within the scope of their employment in authorizing such a person as Veares to drive on their employers' behalf. But no such illegality was shewn here. Such, then, being my view of the legal doctrine applicable to the facts of this case, I cannot say that there was not some evidence on which the county court judge might find that such an emergency existed as would bring the case within the limits of that doctrine. Whether upon the question of fact I should have arrived at the same conclusion is another matter; but I am of opinion that we cannot upon the question of law say that the judgment was wrong.

Appeal dismissed.

Solicitor for plaintiff: *W. E. Aldis, for H. Parry, Birmingham.*

Solicitors for defendants: *T. A. Dennison & Co., for Tanner, Birmingham.*

J. F. C.

HALESTRAP *v.* GREGORY. 1895

Negligence—Damage—Remoteness. *Feb.* 14.

The plaintiff delivered to the defendant a mare to be agisted in a field, which was separated by a wire fence from another field in the occupation of a cricket club. Owing, as was alleged, to the negligence of the defendant's servant in leaving open a gate between the two fields, the mare escaped from the field in which she was placed into the cricket field; whereupon certain members of the club endeavoured in a careful and proper manner to drive her back through the gate. The mare refused to go through the gate, and having run against the wire fence fell over it, and was injured by one of the iron standards:—

Held, that the injury to the mare was the natural consequence of the gate having been left open, and that the defendant was liable.

APPEAL from county court of Wandsworth.

The action was for the breach of a contract of agistment of a mare which, while being so agisted by the defendant, was alleged to have suffered damage through the negligence of the defendant's servant. The plaintiff having proved the facts above stated in the head-note, the county court judge at the close of the plaintiff's case held that, even if the defendant's servant left the gate open and in so doing was guilty of negligence, the connection of that negligence with the damage to the mare was too remote to render the defendant liable therefor, and he accordingly non-suited the plaintiff. The plaintiff appealed.

W. A. Willis, for the plaintiff.

Hammond Chambers, for the defendant.

[The following cases were cited: *Smith* v. *Cook* (1); *McMahon* v. *Field* (2); *Lawrence* v. *Jenkins* (3); *Powell* v. *Salisbury* (4); *Burrows* v. *March Gas and Coke Co.* (5); *Clark* v. *Chambers* (6); *Sharp* v. *Powell*. (7)]

WILLS J. This is one of those cases which are on the borderline and in which it is not easy to say whether the damage is

(1) 1 Q. B. D. 79.
(2) 7 Q. B. D. 591.
(3) Law Rep. 8 Q. B. 274.
(4) 2 Y. & J. 391.
(5) Law Rep. 5 Ex. 67.
(6) 3 Q. B. D. 327.
(7) Law Rep. 7 C. P. 253.

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too remote or not; and but little assistance is to be got from the decided cases. But on consideration I think the county court judge's view was wrong. It seems to me that if two adjoining fields are in the occupation of different owners, A. and B., and A. leaves the gate open between the two fields so that A.'s horse strays into B.'s field, it is only natural that B. should try and drive it back again as quickly as possible, especially if, as here, the horse's presence in the field was likely to do serious damage. Then the evidence was that the cricketers in the present case in exercising their right to drive the mare back were guilty of no negligence, but tried to drive it in a reasonable and proper manner. But it is natural for animals to obey their instincts. And it is the natural instinct of an animal which has escaped from the field in which it was confined to resist all attempts to catch it or return it to its place of confinement. Any one who has ever attempted under such circumstances to drive a horse through a gate back into its own field knows it is not unlikely that the horse will go in any direction except that in which it is wanted to go. When so driven the horse is very likely to bolt, and, if there is a wire fence in the way, to hurt itself. I think, therefore, that if the defendant's servant did in fact leave the gate open, the injury to the mare was the natural consequence of his doing so. As the defendant's witnesses have not been heard the case must go back for a new trial.

LAWRANCE J. I am of the same opinion.

Order for new trial.

Solicitors for plaintiff: *Alpe & Ward.*

Solicitors for defendant: *Clement Cheese & Green.*

J. F. C.

THE QUEEN *v.* HUGGINS AND ANOTHER.

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Jan. 29.

Justices—Interest—Disqualification—Membership of Class in whose Interest Proceedings taken — Qualified Pilot — Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 361.

By s. 361 of the Merchant Shipping Act, 1854, an unqualified pilot, assuming or continuing in the charge of any ship after a qualified pilot has offered to take charge of her, is liable to a penalty recoverable before a court of summary jurisdiction :—

Held, that, upon the hearing of a summons under the above section, a qualified pilot, belonging to the pilotage district within which the offence was committed, has, by reason of his membership of the class in whose interest the proceedings are taken, such an interest as will disqualify him from acting as a justice, even though by reason of the peculiar nature of his employment as a pilot he is not brought into competition with unqualified pilots, and has consequently no personal interest in the conviction.

CERTIORARI to bring up a conviction by justices to be quashed.

Thomas James Clancy was summoned before the justices of the borough of Gravesend for that he, on September 27, 1894, being an unqualified pilot, did, on the River Thames and within the said borough, assume and continue in the charge of the ship *Elloe* after a qualified pilot had offered to take charge of her, contrary to the provisions of s. 361 of the Merchant Shipping Act, 1854. (1) The summons was heard before a bench of six justices, and Clancy was convicted. One of the said justices, a Mr. Thomas Martin, was a duly licensed Trinity House pilot, licensed to pilot ships up and down the Thames from London to the sea. There are two classes of licensed pilots in the River Thames—"turn pilots," who are not in the regular employment of any particular shipowner, but take turns at a pilot station to pilot any ship that may offer; and "choice pilots," who are chosen and regularly engaged beforehand by shipowners to pilot their ships and no others. Martin had for forty-three years been a choice pilot, and for the last nineteen years had acted as a choice pilot for the Peninsular and Oriental Steam Navigation Company only. That company never employs

(1) Since January 1, 1895, this is replaced by s. 598, sub-s. 1, of the Merchant Shipping Act, 1894.

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unlicensed pilots, and by the terms of his employment by the said company he was not entitled to offer his services as pilot to any other employer. There was no evidence as to the number of licensed pilots belonging to the London Pilotage District.

The defendant Clancy having obtained a rule nisi for a certiorari to bring up the conviction to be quashed on the ground that Martin, one of the convicting justices, had an interest in the conviction,

Poland, Q.C., and *R. D. Muir*, shewed cause. It has not been suggested that Martin had any pecuniary interest in the result of the proceedings, nor that he was in any sense acting as prosecutor as well as judge, as was the case with one of the justices in *Reg.* v. *Allan.* (1) And the authorities go to shew that where the objection to the conviction is that the justice was interested, the interest, if not pecuniary, must be so substantial as to render it likely that the justice has a real bias, and that the mere possibility of bias is not sufficient to disqualify: *Reg.* v. *Meyer* (2); *Reg.* v. *Handsley.* (3) It is not enough that the proceedings are instituted for the protection of a class to which the justice belongs: *Leeson* v. *General Council of Medical Education.* (4) Here Martin could not possibly be brought into competition with Clancy, except in the remote contingency of his being dismissed from his employment, for he would never voluntarily surrender the more lucrative employment of a choice pilot for the less lucrative employment of a turn pilot. The only possible objection that can be urged against Martin is that he may have a professional sympathy with his professional brethren. But there is no case hitherto decided which goes the length of saying that that is enough to disqualify.

Burnie, in support of the rule. It is enough if there is a likelihood of real bias. The qualified class of pilots at Gravesend is very limited in number. If Martin lost or gave up his employment and became a turn pilot he would at once be brought into competition with Clancy, and the possibility of such a contingency arising is enough to give him a bias against the defendant.

(1) 4 B. & S. 915.
(2) 1 Q. B. D. 173.
(3) 8 Q. B. D. 383.
(4) 43 Ch. D. 366.

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WILLS J. In these cases there is always a certain degree of difficulty, owing to the confusion which has arisen from a failure to clearly distinguish between the different classes of cases in which decisions have been quashed upon certiorari on the ground of the improper constitution of the tribunals which gave them, namely, cases in which one of the tribunal had a pecuniary interest, cases in which, though having no pecuniary interest, he nevertheless had a bias, and cases in which he filled the part of prosecutor as well as judge; and also from a failure further to distinguish between cases in which the decisions impugned were those of regular judicial tribunals, and those in which they were the decisions of an administrative rather than of a judicial body, but were nevertheless opposed to ordinary notions of justice. The principles which are applicable to these several classes of cases are not in all respects identical. Here there is no question of Martin having had any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias. It appears that Martin belongs to a small class of privileged persons for whose protection these proceedings were taken. Under those circumstances I cannot help thinking that it would not be in the general interests of justice that the conviction should be allowed to stand. It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness. Suppose that all these six justices had been licensed pilots, or suppose, on the other hand, that they had all been unlicensed pilots, in neither case would any one venture to say that the tribunal would have been a fair one. But if that be so, then the objection must equally exist when only one out of the six is a licensed pilot. It is far safer to enlarge the area of this class of objections to the qualification of justices than to restrict it.

WRIGHT J. I am of the same opinion and for the same reasons. I will only add this. Some of the cases in which the Court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. They are very different from cases of decisions by judicial

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tribunals. In my judgment, the Court ought to be slow to interfere in the former, but in the latter ought to interfere on much slighter grounds.

Rule absolute.

Solicitor for defendant: *Bedford.*

Solicitors for justices: *Sismey & Sismey, for Tolhurst, Lovell, & Clinch, Gravesend.*

J. F. C.

1895
Jan. 30.

STAFFORD *v.* DYER.

Ship—Compulsory Pilotage District — Unexempted Ship—Qualified Pilot—Pilot for Exempted Ships—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 353—*Order in Council, February* 5, 1873.

By s. 353 of the Merchant Shipping Act, 1854 (1), it is provided that "Every master of any unexempted ship navigating within any (compulsory) pilotage district who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship, employs or continues to employ an unqualified pilot to pilot her" shall incur a penalty:—

Held, that the expression "qualified pilot" must be understood with reference to the class of ship of which the pilot offers to take charge, and that a pilot licensed to pilot exempted ships only is not such a qualified pilot as to render liable to the penalty of the section a master of an unexempted ship who, after the said pilot has offered to take charge of her, continues to employ an unqualified person to pilot her.

CASE stated by justices.

An information was laid by the appellant against the respondent under s. 353 of the Merchant Shipping Act, 1854, for that he being the master of a ship navigating within a certain compulsory pilotage district unlawfully, after the appellant, a qualified pilot, had offered to take charge of such ship, continued to employ an unqualified person to pilot her.

At the hearing the following facts were proved:—

The respondent was the master of the British steamship *Falcon*, which trades and carries passengers between London and Hull.

On September 27, 1894, the said steamship was off Gravesend, and was then carrying passengers on a voyage from Hull to

(1) See now the Merchant Shipping Act, 1894, ss. 586, 598 (2), 603 (2).

London, when the appellant offered to take charge of her as pilot from Gravesend to London. The respondent refused the appellant's said offer.

The appellant was licensed to pilot exempted ships between London and Gravesend. A true copy of his licence is annexed to and forms part of this case.

When the appellant offered to take charge of the said ship no pilot licensed to pilot between London and Gravesend unexempted ships carrying passengers between places in the United Kingdom had offered his services.

After the said offer and refusal above mentioned the respondent continued to employ one George Kemp to pilot the said ship, which was still carrying passengers and was not an exempted ship upon the River Thames from Gravesend to London, which is within the compulsory pilotage district called the "London District."

The said George Kemp was an unqualified pilot.

Among the different classes of pilots for the River Thames between London Bridge and Gravesend are the following: (1.) The fully qualified pilots who are free from the restrictions of the other classes hereinafter named. (2.) Those licensed under the Order in Council of 1st of May, 1855, who until after a term of service and further examination are limited to ships not exceeding fourteen feet draught unless there shall be no fully qualified pilot to be obtained. (3.) Those licensed under the same Order in Council to pilot home trade passenger ships only. (4.) Those licensed under the Order in Council of February 5, 1873, to pilot exempted ships and no others. The appellant belonged to this class. (5.) Pilots who have no licence from any pilotage authority. The said George Kemp belonged to this class.

By the above-mentioned Order in Council dated February 5, 1873, which recited that by s. 333 of the Merchant Shipping Act, 1854, it was enacted that it should be lawful for every pilotage authority by bye-law made with the consent of Her Majesty in Council, inter alia, "to fix the terms and conditions of granting licences to pilots"; that it appeared to the Trinity House, being the pilotage authority of the London district, that

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certain persons had for a long time been employed in piloting ships up and down the Thames between London and Gravesend without being duly licensed, and that it was desirable that a certain number of such persons should be licensed to pilot exempted ships; and that it was deemed expedient that the qualifications to be required of such persons and the terms and conditions of granting licences to them should differ from the qualifications, terms, and conditions which apply to the licensing of pilots for the general service, and that it was intended to designate such persons "pilots for exempted ships"; Her Majesty proceeded to approve the following regulation amongst others:—

II. "Any person who shall be able to prove to the satisfaction of the Trinity House that he has piloted ships on the River Thames between London Bridge and Gravesend for a period of two years previously to the date of this bye-law, or that he is otherwise eligible by practical experience in the navigation of vessels within that district, shall be deemed qualified, after examination as in the said Act provided, to be licensed as a pilot for the navigation up and down the River Thames between London Bridge and Gravesend, subject to the following terms and conditions, viz.:—

1. "That such licence shall authorize him to act as pilot only on board such exempted ships and no others, all pilots so licensed being intended to be designated 'pilots for exempted ships.'"

The licence of the appellant was headed "Pilots for exempted ships. This licence does not authorise the bearer to pilot any ship carrying passengers," and, after reciting the above-mentioned Order in Council, proceeded to "appoint and license the said Edward George Stafford to act as a pilot for the purpose of conducting exempted ships and no others."

The justices being of opinion that the appellant was not a "qualified pilot" within the meaning of the section dismissed the information subject to a case for the opinion of the Court.

Sir W. Phillimore, (*R. D. Muir*, with him), for the appellant. The fact that appellant's licence authorized him to pilot exempted ships only did not make him the less a qualified pilot. By s. 2,

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"qualified pilot" is defined to mean "any person duly licensed by any pilotage authority to conduct ships to which he does not belong." The appellant came within that definition. He had passed an examination and obtained a licence. The Act does not recognise any degrees of qualification. The only limitation imposed upon a licensed pilot's power of taking charge of ships is one of area. By s. 349 "any qualified pilot acting beyond the limits for which he is qualified by his licence shall be considered an unqualified pilot." But, subject to that one limitation, a pilot once licensed is qualified, for anything there is in the Act to the contrary, to take charge of any ship whatever her class may be. The Order in Council cannot override the Act, and in so far as it purports to create degrees of qualification is ultra vires. Consequently the limitation which under the authority of that Order is introduced into the appellant's licence is inoperative. In *The Carl XV.* (1), in an action of damage by collision, the defendants pleaded under s. 388 that the negligence, if any, which caused the collision was that of a qualified pilot within a district where the employment of such pilot was by law compulsory. The licence of the pilot in charge of the defendants' ship was expressly limited to ships drawing not more than fourteen feet water, and the defendants' ship was of a greater draught. Yet the Court of Appeal held that the pilot was a qualified pilot within s. 388, and allowed the plea of compulsory pilotage.

Aspinall, Q.C., and *R. Isaacs*, for the respondent, were not called upon.

LAWRANCE J. This case seems to be free from doubt. The licence was a licence to pilot exempted ships and no others. It cannot be reasonably contended that a licence so limited qualifies the holder of the licence to pilot unexempted ships. The case of *The Carl XV.* (1) seems to have turned upon the language of an Order in Council of May, 1855, in accordance with which the licence in that case was granted. The Order provided that "no person licensed as a pilot for the London district shall take charge as such of any ship drawing more than fourteen feet

(1) [1892] P. 324.

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water in the River Thames . . . . until such person shall have acted as a licensed pilot for three years, and shall have been after such three years on re-examination approved of in that behalf by the Trinity House on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water." The Court held that the exception at the end of the Order ought to be read into the licence, and that as at the time that the pilot boarded the ship there was no pilot obtainable who was licensed to pilot vessels drawing more than fourteen feet water, he was a qualified pilot within the meaning of s. 388. But there is no corresponding exception in the Order in Council dealing with licences to pilot exempted ships only. The appellant, therefore, quoad the *Falcon*, which was an unexempted ship, was not a qualified pilot. The appeal must be dismissed.

WRIGHT J. I am of the same opinion. There is no doubt that in *The Carl XV.* (1) the judges of the Court of Appeal rested their judgments upon the words of exception in the Order in Council, the effect of which when read into the licence was in their view to render the pilot qualified who otherwise could not have been so qualified. Here there are no words of exception in the Order in Council to read into the appellant's licence. That Order, like the licence, is expressly confined to exempted ships. The appellant, consequently, when seeking to take charge of a ship of the *Falcon's* class, was in no better position than a person who held no licence at all.

Appeal dismissed.

Solicitors for appellant: *Sismey & Sismey, for Tolhurst, Lovell, & Clinch, Gravesend.*

Solicitor for respondent: *W. Batham.*

(1) [1892] P. 324.

J. F. C.

[IN THE COURT OF APPEAL.]

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BOOTH *v.* ARNOLD.

Defamation — Slander — Words imputing Misconduct in a Public Office — Special Damage immaterial — Municipal Corporation — Alderman — Amotion, Power of — Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), *ss.* 12–14, 39.

An action of slander will lie without special damage for words imputing dishonesty or malversation in a public office of trust, although the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not.

Therefore, where the defendant spoke concerning an alderman of a municipal borough words importing a charge that he had used his office for the purpose of dishonestly procuring advantage to himself:—

Held, that an action of slander lay without proof of special damage.

By Lopes L.J.: The power of amotion from a corporate office incident to a corporation at common law exists in the case of an alderman of a borough subject to the Municipal Corporations Act; and also the words complained of were actionable as imputing a criminal offence.

Application by defendant for judgment or new trial in an action tried before Charles J. with a jury.

The action was for slander in respect of words spoken by the defendant of the plaintiff, who was an alderman of the borough of Halifax and chairman of the improvement committee of the council of that borough, which were alleged to impute that the plaintiff had as such chairman on behalf of the corporation negotiated the purchase by the corporation of land in which he was interested at an exorbitant and unfair price, and had been guilty of a breach of trust, and was wanting in honesty and integrity as chairman of the committee and as a member of the council. The words used and the facts of the case, so far as material, appear from the judgment of Lopes L.J. No actual damage was alleged or proved by the plaintiff. The jury found that the words spoken by the defendant were defamatory of the plaintiff as imputing to him malversation and misconduct in his office, and they gave a verdict for the plaintiff for 85*l.*, upon which judgment was entered accordingly.

Feb. 5, 6. *E. Tindal Atkinson, Q.C.*, and *Scott Fox*, for the

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defendant. The action is not maintainable. There was no proof of special damage. The cases in which the law infers damage from oral defamation in the absence of proof of actual damage, such as slander of a person in the way of his trade, are all cases where there is a possibility of temporal loss or damage. In cases in which no such loss or damage could by any possibility result from a defamatory oral statement no action will lie. The office of an alderman or town councillor is one of honour or credit, not of profit, and there is no power of removing an alderman or councillor from his office on the ground of such conduct as was imputed by the words complained of. The case, therefore, comes within the authority of *Alexander* v. *Jenkins*. (1) In that case the plaintiff, a town councillor of a borough, was charged with insobriety, and it was held that, as his office was not one of profit and the charge, if true, afforded no ground for removing him from his office, the action was not maintainable. The distinction for this purpose between an office of credit or honour and one of profit is illustrated by many old authorities which are referred to in that case. The reasoning of the judgment appears to be as much applicable to a charge of misconduct in office, as to a charge of unfitness for office. [They also cited on this point *Onslow* v. *Horne* (2); *Stuckley* v. *Bullhead* (3); *Dod* v. *Robinson*. (4)]

There is no power of amotion in the case of municipal corporations which are subject to the provisions of the Municipal Corporations Acts. The constitution and powers of such corporations are wholly regulated by those Acts. Before the Municipal Corporations Act, 1835, when municipal offices were franchises which might be held for life, a power of amotion was obviously essential. Now they are held for a limited period; and the qualifications and disqualifications for them are expressly defined by the statute. The power of amotion at common law was either expressly given by or implied from the terms of the charter of the borough. In the case of such a corporation as this there is no charter. Sects. 12–14 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), provide as to the disqualifications for the office of councillor and alderman, and that councillors shall hold office

(1) [1892] 1 Q. B. 797.
(2) 2 W. Bl. 750; 3 Wils. 177.
(3) 4 Rep. 16.
(4) Aleyn, 63.

for three and aldermen for six years; and s. 39 provides for their disqualification and the vacating of their offices in certain events. These express provisions exclude the implication of the common law power of amotion. Assuming that a power of amotion exists in the case of this corporation, the matter alleged would not, if true, be a good cause for amotion. [They cited on this point *Rex* v. *Taylor* (1); *Rex* v. *Richardson* (2); *Reg.* v. *Ryde* (3); *Lord Bruce's Case* (4); Kyd on Corporations, vol. 2, p. 50; *James Bagg's Case* (5); *Rex* v. *Wells.* (6)]

Waddy, Q.C., and *Waugh*, for the plaintiff. The words spoken by the defendant constitute a slander and are actionable without proof of special damage quite independently of any question of the possibility of amotion. Secondly, there was a power of amotion, and what was said, if true, would have constituted a good ground for amotion. There are many authorities to the effect that words imputing to a man misconduct or corruption in a public office of trust are actionable per se, and apart from any actual damage. [They cited on this point *Aston* v. *Blagrave* (7); *Wright* v. *Moorhouse* (8); *How* v. *Prinn* (9); *Strode* v. *Homes* (10); *Masham* v. *Bridges.* (11)] Misconduct or malversation in the performance of the duties of a public statutory office, such as is imputed to the plaintiff, is indictable as a common law misdemeanour and punishable by fine and imprisonment: *Anonymous Case* (12); *Rex* v. *Pinney.* (13)

In the case of *Alexander* v. *Jenkins* (14) the defamatory words did not impute misconduct in, but only unfitness for, office; and the question whether words imputing misconduct in office would be actionable without special damage was expressly reserved by the Court of Appeal in giving judgment.

A power of amotion is incident to a corporation at common law. The common law power of amotion is not taken away or excluded by the provisions of the Municipal Corporations Act.

(1) 3 Salk. 231.
(2) 1 Burr. 517, 539.
(3) 28 L. T. (N.S.) 629.
(4) 2 Str. 819.
(5) 11 Rep. 93 b, 98 a.
(6) 4 Burr. 1999.
(7) 2 Ld. Raym. 1369; 1 Str. 617.
(8) Cro. Eliz. 358.
(9) 2 Salk. 694; 2 Ld. Raym. 812.
(10) Sty. 338.
(11) Cro. Car. 223.
(12) 6 Mod. 96.
(13) 5 C. & P. 254; 3 B. & Ad. 947
(14) [1892] 1 Q. B. 797.

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If it were, the utmost scandal and inconvenience might arise. An alderman or councillor might continually abuse his office by dishonest, corrupt, or outrageous behaviour in the performance of his functions, and yet he must be allowed to remain in office for the time appointed by the statute. That cannot have been intended. In the cases of disqualification mentioned by s. 39 of the Municipal Corporations Act, 1882, the alderman or councillor is removed, ipso facto, by virtue of the statute, not by act of the council. Special statutory provisions were of course necessary for this purpose, and it cannot therefore be inferred by implication from such provisions that the common law power of amotion is excluded. There is nothing inconsistent with the Municipal Corporations Act in the existence of such a power. [They cited on this point *Rex* v. *Heaven.* (1)]

E. Tindal Atkinson, Q.C., in reply.

Cur. adv. vult.

Feb. 20. LORD ESHER M.R. In this case the action is for slander, and the defendant contends that it is not maintainable, because there was no special damage proved, and it was not possible that the words spoken could damage the plaintiff in any legal sense. It is true that there was no proof of special damage; but it was argued for the plaintiff that the statement made by the defendant was such as might occasion damage to the plaintiff in a legal sense, because, if true, it would have entitled the town council to remove him from his office.

The corporation of which the plaintiff is a member is a modern corporation, to which the Municipal Corporations Act applies. It was said on the one side that in the case of such a corporation the power of amotion still existed, and that it would have applied in the present case. On the other side, it was argued that the power of amotion was either taken away, or never existed, in the case of this corporation; and that, even if such a power did exist, what was here stated of the plaintiff would not have been good cause for amotion. I am of opinion, after consideration of the case, that the question as to the power of amotion is under the circumstances immaterial, and also that

(1) 2 T. R. 772.

this case may be decided quite independently of the decision in *Alexander* v. *Jenkins*. (1) I think that the statement made by the defendant bore the construction that the plaintiff had abused his corporate office for the purpose of improperly and dishonestly obtaining an advantage for himself; and therefore that it amounted to a slander of a man in his office for which an action would lie at common law for general damages without proof of special damage. On this ground, and abstaining from entering upon the other questions which have been raised, I think that the verdict and judgment are right, and this application must be dismissed.

LOPES L.J. read the following judgment:—There are questions affecting corporations of great importance raised in this case, which is my reason for delivering a rather long judgment. I will only state so much of the facts of this case as is necessary to make my judgment intelligible. The plaintiff was an alderman and the defendant a councillor of the county borough of Halifax. About a year and a half before the occurrence of the slander complained of some land, the property of Kirk & Co., of which company the plaintiff was managing director and chief shareholder, had been purchased by the corporation. There was also some property of the defendant's which the corporation had purchased. The negotiations for both these purchases were conducted by the improvement committee, of which the plaintiff was chairman. The plaintiff, feeling a difficulty in negotiating with regard to the sale of land to the corporation in which he had a large interest, thought it desirable that the transaction of the business should be entirely left to a sub-committee, consisting of three aldermen, who accordingly did transact the business and arrange the price to be paid by the corporation to the plaintiff and defendant respectively. The matter had been finally arranged and completed in March, 1893. Previously to October 19, 1894, Frith, a town councillor of the Northowram Ward, had made certain observations about the defendant and the sale of his land to the corporation. About October 19, 1894, Joseph Taylor was seeking to be elected a town councillor

(1) [1892] 1 Q. B. 797.

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of the South Ward, and the defendant, at a meeting held on October 19, 1894, at the Constitutional Club, King's Cross, Halifax, when a large number of persons were present, made a speech advocating the candidature of Joseph Taylor. In the course of his speech the defendant said, speaking of the sale of the plaintiff's land to the council: "No doubt the purchase was arranged by the chairman of the improvement committee and the chairman of the company. Doubtless those chairmen had a long fight and much wrestling over the matter. Indeed, you may just fancy how intent the fight was when I tell you that both gentlemen happened to be the same person, Alderman James Booth."

This is the slander complained of, and the jury found the words defamatory as imputing to the plaintiff malversation and misconduct in his office of alderman and town councillor.

The propriety of the verdict is not sought to be impeached. But it is said that the words are not actionable per se, that the offices of alderman and councillor are offices of credit and honour, and that words imputing misconduct in such offices are not actionable without special damage; that is, unless, if true, they might have a tendency to cause the plaintiff to be removed from his office.

In my judgment, words imputing want of integrity, dishonesty, or malversation to any one holding a public office of confidence or trust, whether an office of profit or not, are actionable per se. On the other hand, when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then, according to the decision in *Alexander* v. *Jenkins* (1), no action lies, where the office is honorary, without proof of special damage.

It is said that this view is contrary to the recent case of *Alexander* v. *Jenkins* (1); but a careful perusal of that case leads me to a different conclusion. In the course of his judgment, Lord Herschell (2) lays down the rule "that where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been

(1) [1892] 1 Q. B. 797. (2) [1892] 1 Q. B. at p. 802.

called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office." It was accordingly held that, without proof of damage, no action lay where the plaintiff had been elected to the office of town councillor for a borough, and the words complained of were, "He is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home." Lord Herschell draws a marked distinction between an imputation of misconduct in an office and unfitness for it. At the commencement of his judgment he says, "The charge is not one made against him of any misconduct in his office, or any acts done by him as an officer which he ought not to have done; but it is simply a charge of unfitness to hold the office to which he had been elected, on account of moral misconduct." Again, towards the close of his judgment he says: "It is not necessary to go so far to-day as to deal with the case of an imputation on a man of misconduct in his office." Lindley L.J., at p. 803 of the report, says: "What the plaintiff complains of here is a slander which is to the effect that, by reason of his drunkenness, he is unfit for the office which he aspires to fill and to which he has been elected. He is not charged with any malversation in his office; we have not to consider that." Kay L.J., on p. 805, expressly reserves his opinion upon what the decision of the Court would have been had there been a charge of misconduct in the office, and not a mere general charge of unfitness for the office—two obviously very different things. *Alexander* v. *Jenkins* (1) is, therefore, no authority for the contention of the defendant, and in the absence of authority I should hesitate long before I held that words imputing gross misconduct in the discharge of the duties of a public office were not actionable per se, even where that office was an office of credit or honour.

Another ground was taken by the plaintiff with which I feel I ought to deal. It was said, assuming the words not to be actionable per se, and assuming that it is necessary in order to maintain the action that a tendency to, or possibility of, damage

(1) [1892] 1 Q. B. 797.

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should be shewn, that such requirement in this case is satisfied, because the imputation complained of is such that the plaintiff, if it were true, might be deprived of his office. The imputation, it was said, is a charge of corrupt and dishonest conduct in a public office, and that was always and still is a cause of amotion from the office. That this was the case before the passing of the Municipal Corporations Acts is beyond question; but the defendant contends that the power of amotion no longer exists now that municipal officers are elected under statutory provisions and hold their offices, not for life, as theretofore, but for limited periods—namely, six years in the case of aldermen and three years in the case of councillors. Sect. 39 of 45 & 46 Vict. c. 50, provides for the avoidance of the office of mayor, alderman, or councillor in the case of bankruptcy, insolvency, compounding with creditors, or temporary absence from the borough. These causes of loss of office are expressly provided for; but none of them, it is to be observed, would have afforded the corporation at common law ground for the removal of any of its members: see 2 Kyd on Corporations, p. 65. The power of amotion for reasonable cause is incident to every corporation, unless it has been taken away by statute. I can find nothing in any statute taking it away, nor anything in any statute inconsistent with its existence. In 1872 a town councillor was removed by the corporation of Penzance for misconduct on various occasions; he was called upon to answer for his misbehaviour on one public occasion, but the resolution which was passed to remove him was not for that only, but for misconduct on other occasions. On a mandamus to restore him the Court, without seeming to doubt that the power of amotion still continued, made the rule absolute on the ground that he had only been called upon to answer for his misconduct on one occasion, and not on the others for which he was removed, and therefore his amotion was invalid, Cockburn C.J. observing that "he was far from saying there was not a power of removal, or that such misconduct as was imputed was not sufficient": *In re Norton.* (1) I was counsel in that case, and, so far as I can recollect, the power of amotion was

(1) June 8, 1872.

never questioned. As to rescinding an invalid amotion, see *Reg.* v. *Ryde.* (1) In this case, too, the power of amotion seems recognised.

In my judgment, the power of amotion for reasonable cause, such as corrupt or dishonest conduct, still exists, and if I am right in this view the objection of the defendant fails, and the action is sustainable, even if possible damage is necessary. It is a power essential to the good order and management of a corporation, and without it I do not see how the business of a corporation could be satisfactorily carried on. The learned counsel for the defendant admitted that, but for such power, a member of a corporation could not be removed for corrupt and dishonest conduct in his office of the most flagrant kind.

But it appears to me that there is another ground upon which this action may be maintained, and that is because the words impute to the plaintiff a criminal offence. The plaintiff is a public officer, and it is imputed to him, as such public officer, that he has acted dishonestly and corruptly in his office. If this charge is true, why is the plaintiff not indictable at common law? In *Bembridge's Case* (2) Lord Mansfield says: "There is another principle, too, and that is this—where there is a breach of trust, a fraud, or an imposition in a subject concerning the public which as between subject and subject would only be actionable by a civil action, yet, as that concerns the King and the public (I use them as synonymous terms), it is indictable." In 6 Mod. 96 the Court says: "If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office." If I am correct in this view of the law, the words complained of would be actionable per se, as imputing a criminal offence. That they did impute misconduct in a matter touching the plaintiff's office was found by the jury.

In the result, I agree with the learned judge in the Court below, and think the application should be dismissed with costs.

RIGBY L.J. I am of the same opinion as the Master of the Rolls for the same reasons, and with the same reservation as to

(1) 28 L. T. (N.S.) 629. (2) 22 State Trials, 156.

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the question with regard to the power of amotion, which I do not think it necessary to decide in this case.

Application dismissed.

Solicitors for plaintiff: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for defendant: *Firth & Co., for Godfrey Rhodes & Evans, Halifax.*

E. L.

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[IN THE COURT OF APPEAL.]

SAN PAULO (BRAZILIAN) RAILWAY COMPANY, LIMITED, APPELLANTS; CARTER (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Company resident in the United Kingdom—Railway in Foreign Country—Trade carried on partly in United Kingdom, partly Abroad—Profits earned Abroad not remitted to United Kingdom—"Foreign Possessions"—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D, Cases* 1 *and* 5—16 & 17 *Vict. c.* 34, *s.* 2.

A company registered under the Companies Acts, whose registered office was in London, were the proprietors of a railway in Brazil. The working of the railway was under the control and direction of, and the business of the company was managed by, the directors in London. The directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the railway. The accounts were kept and the balance-sheets and reports were made out in London, where also the meetings of the company were held, and all dividends were declared and paid. With the exception of certain small amounts for transfer fees and annual interest on money, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers and goods on the railway, and other matters connected with the railway:—

Held, that, the business of the company being partly carried on in the United Kingdom, the company were assessable to income tax, under the First Case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the balance of the profits or gains of their business, and not, under the Fifth Case, only upon the full amount of the actual sums annually received in the United Kingdom.

London Bank of Mexico and South America v. *Apthorpe* ([1891] 2 Q. B. 378) followed.

Colquhoun v. *Brooks* (14 App. Cas. 493) distinguished.

APPEAL from the judgment of a Divisional Court (Vaughan Williams and Wright JJ.) upon a case stated by Commissioners for Income Tax.

The facts stated, so far as material, were as follows:—

The San Paulo (Brazilian) Railway Company, Limited, appealed against an assessment made upon them for income tax under Schedule D of 16 & 17 Vict. c. 34. The company was an English company, registered under the Joint Stock Companies Acts, with memorandum and articles of association, and having its registered office at No. 111, Gresham Street, Old Broad Street, in the City of London.

By the articles of association, it was provided (inter alia) as follows. The business of the company was declared to be the making, maintaining, managing, and working of a railway in Brazil from Santos by San Paulo to Jundiahy. The general direction of the company was to be in London, but the company might have agencies in Rio de Janeiro and San Paulo, and any other places in Brazil. The business was to be carried on by or under the management of the directors, but subject to the control of the general meetings; and no person, except the directors and persons expressly authorized by the board, was to have any authority to enter into any contract so as to impose thereby any liability on the company. Moneys payable to the company were to be received by the directors or by the bankers, or by some person authorized by the board, and were to be paid to the account of the company with the bankers. All payments of the company (except on petty cash account) were to be made by cheques on the bankers drawn in pursuance of a resolution of the board, and signed by two of the directors and counter-signed by the secretary. The registered office of the company was to be at such place in London or Middlesex as the board should from time to time appoint. The ordinary meetings of the company were to be held half-yearly at such places in London or Middlesex as the directors should from time to time appoint. General meetings were to be held at such convenient place in London or Middlesex as the directors or requisitionists calling the meeting should appoint. The board were to have full powers for the following purposes, namely, the entering into any contracts for the construction or service of the railway or the supply of the necessary funds; the making and carrying into effect any agreements, contracts, or conventions for the purchase of lands,

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and the supply of materials, labour, plant, rolling stock, and other effects; the general conduct and management of the business of the company; the appointment and removal and the determination of the duties and salary of the secretary, superintendents, clerks, agents, and servants of the company, and the securities to be taken from them respectively; the keeping of proper accounts of the receipts, credits, payments, liabilities, profits, losses, property, effects, claims, and demands of the company; the controlling, managing, and regulating in all other respects (except as by the articles otherwise provided), of all other matters relating to the company and the affairs thereof. The secretary was to keep the records, books, and papers (not being securities) of the company, allowing such inspection as required by the statute between the hours of eleven in the forenoon and three in the afternoon, to every shareholder who should sign his name in a book kept for the purpose. The board were to appoint a superintendent in Brazil, in order that he might there administer the company's affairs and represent the board, and communicate directly with the government and the provincial government of San Paulo and other authorities, and were to determine his salary and the security to be taken for his duly accounting for all moneys of the company coming to his hands, and for the faithful performance of the duties of his office. The superintendent might at any time be dismissed by the board, and must obey and execute the orders and instructions of the board, and was to make to the board, at such times as they might appoint, reports of the state of the works, and all occurrences which had taken place relating to the company, and to perform such other duties as the board might prescribe. All dividends on shares were to be declared by the ordinary meetings.

The Commissioners found as a fact that, with the exception of transfer fees, amounting, on an average of three years, to 128*l.* a year and annual interest on money amounting, on a like average, to 1423*l.* 11*s.* 3*d.* per annum, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers, goods, merchandise, and cattle on the San Paulo (Brazilian) Railway, and for other services and miscellaneous receipts connected with the railway.

The Commissioners further found as facts, and it was admitted on behalf of the appellants, that the company is an English company resident in England, the control and direction being in London, and the business of the company is carried on under the direction of the directors here. The directors enter into contracts for, and purchase in England, and send to Brazil, the materials for additions, extensions, and improvements of their property, and for repairs thereto, and new plant, such as engines, wagons, &c. The accounts are kept in London, where the balance-sheets, reports, &c., are made out, all meetings are held, and dividends declared and paid. The directors have appointed a superintendent, who resides in Brazil, and he is a salaried servant of the directors, removable at their pleasure, and must obey and execute the orders sent out to him by the directors from London.

The company contended before the Commissioners that they were not chargeable to income tax, under the First Case, Schedule D, s. 100, of 5 & 6 Vict. c. 35, on the full amount of the profits and gains of the company; but, under the Fifth Case, Schedule D, in the same section, only upon the full amount of the actual sums received in the United Kingdom upon an average of three years. The Commissioners held that the company were chargeable under the First Case of Schedule D, and therefore confirmed the assessment subject to the case. (1)

(1) The Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Schedule D, imposes income tax "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Sect. 5 provides that the duties granted by the Act shall be assessed, raised, levied, and collected under the regulations and provisions of 5 & 6 Vict. c. 35 (The Income Tax Act, 1842).

The Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, provides that "the duties hereby granted, contained in the schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment. . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

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The Divisional Court gave judgment for the appellants.

Sir R. T. Reid, A.G., and *Danckwerts*, for the Crown. This case comes within the decision in *London Bank of Mexico and South America* v. *Apthorpe* (1), and is distinguishable from *Colquhoun* v. *Brooks*. (2) The appellants are within the general words of Schedule D, which impose the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any trade, whether carried on in the United Kingdom or elsewhere; and therefore they are assessable under the First Case in the schedule, on the full amount of their profits, whether transmitted to this country or not, unless the effect of the words is cut down with regard to their case by some other words in the statute. In *Colquhoun* v. *Brooks* (2) the trade in question was a foreign business wholly carried on abroad, and there were no means of assessing the profits of such trade in this country. It was therefore held that the case could not be brought under the First Case; but the respondent must be assessed under the Fifth Case, which provides for the duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain and foreign possessions." In this case it is contended that the business of the company must be considered as carried on either wholly in the United Kingdom, or, at most, partly here and partly in Brazil. In either case, it cannot be said to be a "foreign possession." The business is managed by the directors

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First Case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act. . . . Rules.—1st. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending &c. . . . Fifth Case.—The duty to be charged in respect of possessions . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain (now the United Kingdom) and foreign possessions. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain (now the United Kingdom) . . . computing the same on an average of the three preceding years, as directed in the First Case, &c."

(1) [1891] 2 Q. B. 378.

(2) 14 App. Cas. 493.

in this country; the necessary contracts for materials are made here; the books are kept, the accounts are made up, and the dividends are declared here. [They also cited *Cesena Sulphur Co.* v. *Nicholson* (1); *Imperial Continental Gas Association* v. *Nicholson* (2); *Bartholomay Brewing Co.* v. *Wyatt.* (3)]

Bigham, Q.C., and *Bremner*, for the appellants. This case is governed by the decision of the House of Lords in *Colquhoun* v. *Brooks.* (4) It is contended that upon the principles laid down in that case the business of this company is a "foreign possession" within the meaning of the Fifth Case in the schedule. In such a case the tax is not assessable on the full profits of the business, but only on such portion of them as is transmitted to this country, and therefore forms part of the income of the tax-payer in this country. The business of this company is carrying on a railway in Brazil. All the profits are earned and received in Brazil. The fact that the directors give directions in this country as to the mode in which the business is to be carried on in Brazil is immaterial. The trade is really a foreign trade, and the source of profit, namely, the railway, is a foreign possession. It is an accident that the contracts for plant, &c., happen to have been made in this country by the directors. They might purchase the plant equally well in Belgium or elsewhere. Merely buying goods in the United Kingdom for the purpose of carrying on business abroad is not carrying on business in the United Kingdom. The case of *London Bank of Mexico and South America* v. *Apthorpe* (5) is distinguishable, for there the business of the bank was treated as one business which was carried on in England. [They also cited *Sulley* v. *Attorney-General* (6); *Erichsen* v. *Last.* (7)]

LORD ESHER M.R. In the case of *Colquhoun* v. *Brooks* (8) the House of Lords affirmed the decision of this Court, and it appears to me that the grounds of their decision were really the same as those upon which we decided the case. They held that,

(1) 1 Ex. D. 428.
(2) 37 L. T. (N.S.) 717.
(3) [1893] 2 Q. B. 499.
(4) 14 App. Cas. 493.
(5) [1891] 2 Q. B. 378.
(6) 5 H. & N. 711.
(7) 8 Q. B. D. 414.
(8) 21 Q. B. D. 52; 14 App. Cas. 493.

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notwithstanding the large words of Schedule D, and, although profits did accrue to the respondent, who was resident in the United Kingdom, from a business carried on elsewhere than in the United Kingdom, and so he came primâ facie within those words, yet, because the whole of the business was carried on abroad, the case could not be brought within the First Case of the schedule. But, if there is nothing to prevent a case from being brought within the First Case, there is nothing in the decision of the House of Lords which says that the assessment is not to be under that Case. It seems to me clear that, if a case comes within the First Case, it cannot be brought within the Fifth Case. We had to consider the effect of *Colquhoun* v. *Brooks* (1) in the case of *London Bank of Mexico and South America* v. *Apthorpe*. (2) We were of opinion that the judgment of the House of Lords was that, where a trade or business is entirely carried on abroad, the case is within the exception of the Fifth Case; but that it did not decide that, where a trade or business is carried on partly in the United Kingdom and partly abroad by a person resident in the United Kingdom, as it was in the case before us, the case is not within the First Case; and we held that the assessment there was rightly made under the First Case. The law, therefore, as the authorities stand, is clear. It has been repeatedly said during the argument by the counsel for the appellants that the question is where the profits are earned, meaning thereby really where they are received. The profits are earned by the whole operation of carrying on the trade; and, moreover, the material question under the words of the statute is not where the profits are earned, but where the trade is carried on. It was argued that, where the master of a business resident in England determines in this country what steps are to be taken in the conduct of the business, what contracts are to be made, and the terms of them, yet, if the contracts are to be carried out abroad, the direction and management of the business in England forms no part of the business by which the profits are earned. But it is obvious that, if the master of such a business makes injudicious contracts, he will not get any profits, whereas, if he makes judicious con-

(1) 14 App. Cas. 493. (2) [1891] 2 Q. B. 378.

tracts, he will. It was said that, if the master of a business resident in England buys in this country the materials necessary for carrying on the business, but they are not worked up here, no part of the business by which the profits are earned is carried on in England. These appear to me to be obvious fallacies to which the counsel for the appellants were driven by the stress of the case. The purchase of materials is in most trades a most essential part of the business. What are the facts in the present case? It appears that everything that is done in working the railway in Brazil is done by the order and direction of the directors in England. They make all the contracts, and buy the necessary materials, engines, &c. If they made injudicious contracts and bought bad materials and engines, the business of the company would soon come to ruin. No one in America can do anything with regard to the railway except with the authority of the directors. It seems to me beyond discussion that a great part of this business or trade is carried on in England by its masters, the directors of the company. It appears to me, therefore, that this case falls within the authority of *London Bank of Mexico and South America* v. *Apthorpe* (1), which is binding on this Court—not within that of *Colquhoun* v. *Brooks*. (2) For these reasons I think the appeal should be allowed.

LOPES L.J. I am of the same opinion. The question is whether this case comes within the First Case or the Fifth Case of the schedule. To my mind, upon the present state of the authorities, this case resolves itself into a question of fact. The law appears to me to be clear as the authorities stand. The two decisions which it is important to consider for the purposes of this case are *Colquhoun* v. *Brooks* (2), and *London Bank of Mexico and South America* v. *Apthorpe*. (1) The first of those cases appears to decide that there is an exemption in the case of a business entirely carried on abroad, except so far as it comes within the Fifth Case. But in the second of those cases it was decided that the same principle does not apply where a trade or business is carried on partly in England and partly abroad.

(1) [1891] 2 Q. B. 378. (2) 14 App. Cas. 493.

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Lopes L.J.

The case is put very clearly by the Master of the Rolls, when he says, "How are the profits of the business to be ascertained, which are partly the result of the transactions abroad? They are to be ascertained by bringing into the account the transactions which earn money both abroad and in England, and setting against them the expenses of the business in England and the expenses of the agencies abroad, and determining here, in England, the difference between the two, and that difference represents the profits of that business so carried on in England. Therefore the profits cannot be got at except in England, and by dealing with all the transactions of that business carried on under the directions of the masters in England, although some of those transactions are carried on abroad. That is not a case of carrying on any business abroad. At all events, it is not a case of carrying on business solely abroad." I understand the effect of that decision to be that, if the case is not one of a business carried on solely abroad, it comes within the First Case, not the Fifth.

That being the state of the authorities on the subject, the question becomes one of fact, namely, where the business of this company is carried on. It seems to me impossible upon the statements in the case to say that it is not, partly at any rate, carried on in England. I cannot quite follow the reasoning of Wright J. in the Court below. He seems to admit that the business of the company is partly transacted here, but he says that the profit-earning part of the business is carried on in Brazil. The fallacy which appears to me to run through the judgment of the Divisional Court is that the case depends on the question where the profits are received, whereas it really depends on the question where the business is carried on.

RIGBY L.J. I agree. The case of *Colquhoun* v. *Brooks* (1) appears to have been decided in this Court on the ground that, where a trade or business is entirely carried on abroad, it is not within the First Case of the schedule. That decision was affirmed by the House of Lords, I think substantially upon the same principle. The House of Lords went, it appears from the

(1) 21 Q. B. D. 52; 14 App. Cas. 493.

report, into a more minute examination of the sections of the Income Tax Acts than was made in this Court. The mode in which they arrived at the conclusion which they adopted was as follows: They seem to have been of opinion that, although the facts of the case came within the general words of Schedule D and the First Case, yet such general words might be cut down in some cases by other parts of the Act; and, not finding upon examination of the sections of the Act any means of assessing the profits of a trade or business, unless it was at any rate partly carried on in the United Kingdom, they thought themselves justified, notwithstanding the general words used, in limiting the operation of the First Case to cases where the Act provides means of assessment; and then considered the case of a business entirely carried on abroad as one coming within the Fifth Case, under which persons receiving profits from "foreign possessions" are assessable on such profits as they actually receive in this country. But after that decision came the case of *London Bank of Mexico and South America* v. *Apthorpe*. (1) Though the appellants' counsel undertook to distinguish that case from the present, I do not think they succeeded in doing so satisfactorily. That case is binding on us, and I think that, if we decided otherwise than we are deciding, we should be overruling it. While saying that we are bound by that case, I do not wish to suggest that, if it had never been decided and we had, in view of the decision of the House of Lords in *Colquhoun* v. *Brooks* (2), to decide the present case, I should not come to the same conclusion. The test is nowhere stated in the Act to be the place where the profits are earned or the income made, as suggested for the appellants. At the most the case here made out is that, the railway fares being paid in Brazil, the money out of which the profits ultimately arise is received in Brazil. There is nothing in the Act to justify our departing from the plain words of Schedule D, and holding that profits cannot be assessed where they arise out of moneys received abroad. We find that s. 106 of the Income Tax Act, 1842, dealing with particular instances that come within the First Case, provides that persons engaged in any trade,

(1) [1891] 2 Q. B. 378. (2) 14 App. Cas. 493.

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manufacture, profession, or employment are to be chargeable by the Commissioners acting for the parish or place where such trade, manufacture, profession, or employment is carried on or exercised wholly or in part in this country. The question therefore seems to me to be whether this company's business was carried on wholly or in part in England. What are the facts with regard to that question? This is an English corporation which can only act through the directors, or through a general meeting. No corporate act can be done by the company except through the directors as their delegates, or by a general meeting which must be held in London or Middlesex. The fact that the administration is carried on here is not, however, so conclusive to my mind as the fact that the essential portion of the business which consists in the purchase of the necessary plant, engines, &c., is carried on here. There is a railway in Brazil, but that railway could not be worked, and could not be a source of profit, unless it were supplied with rolling stock and that stock were kept up. It was suggested that the necessary rolling stock, &c., might be purchased in Brazil or elsewhere out of the United Kingdom. I do not see why we should be called upon to decide this case on a hypothesis and not on the facts which actually exist. But, even if this were admitted, there would still be a great deal that is done in this country which is conducive to earning the profits of the concern, and without which no profit could be earned. It appears to me that this case comes exactly within the decision in *London Bank of Mexico and South America* v. *Apthorpe* (1) as being a case in which the trade or business of the appellants is partly carried on in this country.

Appeal allowed.

Solicitors for appellants: *Clements & Williams.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1891] 2 Q. B. 378.

E. L.

[IN THE COURT OF APPEAL.]

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Feb. 12.

BAXTER *v.* FRANCE AND OTHERS (No. 2).

Practice—Third Party Procedure—Directions, Refusal to give—Discretion—Indemnity—Order XVI., *rr.* 52, 55.

In a case where defendants in an action for recovery of land and mesne profits claimed against a co-defendant, from whom they had purchased the land, damages for breach of covenants implied by virtue of the Conveyancing and Law of Property Act, 1881, in addition to indemnity under those covenants, so that all the matters in dispute between them and the co-defendant as third party could not be determined in the action, and where, also, it was a very doubtful question of law whether there was a right to indemnity under the Act:—

Held, that under the circumstances there was not a question proper to be tried in the action as to the liability of the co-defendant as third party, and therefore a judge at chambers rightly exercised his discretion by refusing to give directions under Order XVI., r. 52.

APPEAL from the decision of Day J. at chambers declining to give directions under Order XVI., r. 52.

The facts were as follows.

The action was brought to recover possession of land and for mesne profits. France's co-defendants, who had purchased the land in question from him, had served upon him a third party notice under Order XVI., r. 55, claiming indemnity from him for any loss, or damage, or costs arising out of the plaintiff's claim against them, on the ground that by the deed of conveyance from him to them dated February 6, 1893, he had conveyed the land as "beneficial owner," and with the covenants to be implied therefrom under and by virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

It appeared that the land had originally been let by the plaintiff's father on a yearly tenancy to the defendant France's father, who had paid rent for it to the plaintiff's father until the death of the latter in 1878. The plaintiff's father died intestate, and the plaintiff was his heir-at-law. The defendant France was the heir-at-law of his father, who died intestate in 1891. The title made by the defendant France on the sale of the land to his co-defendants depended on the Statute of Limitations, and he had made by way of evidence of his title a

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statutory declaration, from which it appeared that, since the death of the plaintiff's father in 1878, the defendant France's father until his death, and subsequently he himself, had been in possession of the land as absolute owner. On the other hand, the statement of claim alleged that rent had been paid by the defendant France's father down to the year 1888. France's co-defendants had after the purchase of the land expended money in building on it, the amount of which, inter alia, they claimed to recover as damages for breach of the covenants implied under the Conveyancing and Law of Property Act, 1881.

Upon a summons taken out for directions under Order XVI., r. 52, the Master referred the application to Day J. at Chambers, who refused to make an order for directions.

Haldane, Q.C., and *J. E. Bankes*, for the defendants other than France. These defendants have a right to indemnity from France under the Conveyancing and Law of Property Act, 1881, s. 7 (1) A. The title of the defendant France to convey depends on the Statute of Limitations, and, if the defendant France's father paid rent down to 1888, that title would be defeated. The covenants implied by virtue of the section are that, "notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered," the person who so conveys has power to convey the subject-matter expressed to be conveyed; and "that freed and discharged from or otherwise by the person who so conveys sufficiently indemnified against all such estates, incumbrances, claims, and demands, other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person . . . . or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value." It is alleged by the plaintiff that the elder France paid rent within twelve years before the action. That would be an act done by a person through whom the defendant France derived title within the meaning of the Act. There would if so certainly be a right to

"indemnity" in respect of any mesne profits recovered in the action and costs; and there would be a right under the covenants to recover the price paid for the land which, it is contended, would also be "indemnity." Therefore the case comes within the scope of the third party procedure. It does not follow from the fact that there is also a claim for damages which may not strictly speaking be indemnity, that it is not the proper and most convenient course to determine in this action the claim for indemnity. [They cited *Schneider* v. *Batt* (1); *Pontifex* v. *Foord.* (2)]

Channell, Q.C., and *R. H. Spearman*, for the defendant France, were not called upon to argue.

LORD ESHER M.R. It is contended by the appellants that the learned judge ought to have given directions under Order XVI., r. 52. It seems to me that, under that rule, the judge has a discretion whether he will give directions or not. I think that the case of *Schneider* v. *Batt* (1) shews, in the first place, that, if the judge refuses to give directions, he thereby dismisses the third party from being a third party to the action. It may be suggested that by such an order the judge only says that he will not give directions, and that, if he means to dismiss the third party from the action, he should make an order expressly to that effect. I do not think that is necessary. It appears to me to follow from that case that, by refusing to give directions, the judge strikes the third party, as such, out of the action, leaving him of course a simple defendant, where he is one of the defendants. Another result of the case of *Schneider* v. *Batt* (1) seems to me to be this. The general scope of the third party procedure is to deal with cases where, by applying it, all the disputes arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party, can be tried and settled in the same action. In a case where there will remain a dispute arising out of the transaction which cannot be tried in the same action, but must form the subject of another action, so that in the result there must be two actions, the judge will rightly exercise his discretion by declining to give directions.

(1) 8 Q. B. D. 701. (2) 12 Q. B. D. 152.

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In the present case, if the plaintiff succeeds against the defendant France's co-defendants, the question arises whether they can claim indemnity against France. If they had not expended money in building, and there had been therefore nothing which they could claim but indemnity against mesne profits and the price which they had paid, it may be that the judge might have given directions, on the ground that all matters in dispute could have been settled in this action. But they have built on the land, and they claim to recover from France the money which they have so expended. That claim would not, in my opinion, be a claim for indemnity within the rules as to bringing in third parties, but an independent claim for damages. There is thus a portion of the disputes arising out of the transaction which cannot be determined in this action, but must form the subject of another action. The case, therefore, comes within the rule which I have mentioned as to the exercise of the judge's discretion. For these reasons I think the judge was right in refusing to give directions, and striking the defendant France out as a third party, leaving his co-defendants to bring an independent action against him. Furthermore, I think that, where an application to a judge at chambers for directions involves the trial of such a preliminary question as whether, in a case like this, on the true construction of such an enactment as s. 7 of the Conveyancing and Law of Property Act, 1881, a claim for indemnity arises, that alone is a sufficient ground for refusing to give directions.

LOPES L.J. I am of the same opinion. This is an appeal against the decision of a judge at chambers refusing to give directions as to the trial of a question of indemnity as between the defendant France and his co-defendants. The facts appear to be as follows. The defendant France sold the land in question to his co-defendants, who expended money in building on the land. The plaintiff subsequently brought the present action against the defendants. The title set up by the defendant France is based on the Statute of Limitations, and the sole question apparently upon which this action will depend is whether rent was paid for the land down to so late a period that

the Statute of Limitations has not run. Under these circumstances, the other defendants have served a third party notice on the defendant France, and, on a summons for directions, the judge at chambers has refused to give any. In my opinion his decision was right. The object of the third party procedure is to prevent multiplicity of actions. I think it is intended to apply to clear cases of indemnity and contribution where all questions as between the plaintiff and defendant and between the defendant and a third party, arising out of the transaction to which the action relates, can be finally settled in the action. That view is supported by the case of *Schneider* v. *Batt.* (1) Applying it to the facts of the present case, how does the matter stand? I may say at once that I do not think it necessary on the present occasion to construe the language of the 7th section of the Conveyancing and Law of Property Act, 1881. I will assume that there would in this case be a right to indemnity under its provisions. If that be so, the defendants other than France might have a partial remedy in this action. They would have a claim to indemnity as regards costs and mesne profits, and perhaps the price of the land; but they have another claim, namely, for compensation by way of damages for the expenses they have incurred in building, which clearly would not be indemnity. Therefore, assuming that to the extent which I have mentioned they would have a claim to indemnity within the meaning of the third party procedure, yet that procedure would not cover this further claim, which would still remain to be tried between the defendant France and his co-defendants in another action. Under these circumstances, I think the learned judge had sufficient ground in the exercise of his discretion for refusing to give directions. The result of the refusal to give directions is, I think, according to the decision in *Schneider* v. *Batt* (1), to dismiss the third party from the action.

RIGBY L.J. I am of the same opinion. The third party procedure is intended for the useful purpose of enabling a defendant to bring in as a third party another person, whether a co-defendant or not, in order that all questions as to contribution

(1) 8 Q. B. D. 701.

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or indemnity may be settled between them in the action. It is obvious, however, that, if it were necessary to decide very doubtful questions of indemnity, and for that purpose to deal with difficult matters of principle, such as arise in the present case, in order to determine whether directions should be given, the very object of the procedure, namely, the prevention of litigation, might be to a great extent defeated. For in such cases there would always be an appeal on the question whether directions should be given. A case may be one in which the right to the indemnity or contribution claimed is clear; and in that case the judge will have no difficulty in deciding upon the claim at the time when it comes before him upon the summons for directions. Secondly, there may be a case where there is clearly "a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed," by which I take to be contemplated a case where the whole matter can be disposed of as between the defendant and the third party. If the judge is satisfied that there is such a question, and that it can properly be tried in the action, he will give directions as to the trial of it. But there is a third class of cases, of which I think the present is an example, where the question whether there is a right to indemnity is far more difficult and complicated than any questions in the action. The appellants in the present case ask us upon a hypothetical state of facts to determine very difficult questions of law which may be rendered wholly unnecessary by the result of the trial of the action. On the ground that this is not a case in which there is a question as to the liability of the third party proper to be tried in the action, and without expressing any opinion on the construction of the Conveyancing and Law of Property Act, 1881, I come to the conclusion that the decision of the learned judge at chambers was correct.

Appeal dismissed.

Solicitors for defendant France: *Black & Fisher, for Nutsey & Payne, Shrewsbury.*

Solicitors for other defendants: *Patersons, Snow, Bloxam, & Kinder, for Salt & Sons, Shrewsbury.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1895
Feb. 4.

ROBERTS *v.* PLANT.

Practice—Writ specially indorsed—Application for Judgment under Order XIV. *—Amendment of Indorsement after Summons taken out—Order* III., *r.* 6; *Order* XIV., *r.* 1 (*a*), (*b*).

In an action upon a cheque by payee against drawer the indorsement on the writ was in accordance with the form prescribed by Order III., r. 6, with the exception that it did not state that notice of dishonour had been given to the drawer. After taking out a summons for judgment under Order XIV., the plaintiff, without leave, amended the indorsement by adding a statement that notice of dishonour had been given. An order was subsequently made giving leave to enter judgment:—

Held that, there being a good special indorsement at the time of the adjudication on the summons, the order was rightly made.

APPEAL from the order of a district registrar referred by a judge at chambers to the Court. (1)

The action was upon a cheque, the indorsement on the writ as originally served being as follows: "Statement of claim. The plaintiff's claim is 45*l.*, the amount of a dishonoured cheque dated February 23, 1894. The following are the particulars: February 23, 1894. To amount of cheque, dated this day, drawn by the defendant in favour of the plaintiff or order, which cheque was dishonoured on presentation by the plaintiff, and still remains due and owing to him." The defendant having duly appeared, the plaintiff took out a summons before the district

(1) The point was taken by the Court of Appeal that, after the passing of the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), a judge at chambers could not refer an application to the Divisional Court where the appeal from chambers was to the Court of Appeal; but it was agreed that the case should proceed, the Court intimating that they would consult with the judges of the High Court as to the proper practice to be adopted in future. The point arising again in a subsequent case, the Master of the Rolls said that, after consultation with the judges, the Court were of opinion that the power of a judge at chambers to refer an application to the Divisional Court was gone as regards cases in which the appeal from chambers was to the Court of Appeal; that there could not be a reference of such an application to the Court of Appeal; but that the proper practice was for the judge to refuse to make or to make an order on the summons, giving leave to appeal if necessary.

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registrar for leave to enter judgment in the action under Order XIV. Upon the application coming on before the district registrar, the defendant took the objection that the indorsement on the writ was not a good special indorsement, as it contained no statement that notice of the dishonour of the cheque had been given. The hearing was adjourned, and the plaintiff, before the case came on again, amended the indorsement on the writ without leave by adding a statement that the defendant had notice of the dishonour of the cheque.

The plaintiff's affidavit in support of the application under Order XIV., which was sworn before the amendment of the indorsement on the writ, stated that the defendant was justly and truly indebted to him in the sum of 45*l.*, the amount of a dishonoured cheque, and as appeared by the particulars indorsed upon the writ; that before action brought the defendant wrote to him acknowledging his indebtedness, and offered to pay the amount by monthly instalments of 5*l.*; and that to the best of his knowledge, information, and belief the defendant had no defence to the action.

The district registrar gave leave to enter judgment.

The defendant appealed to a judge at chambers who referred the matter to the Court.

1894. Dec. 14, 15. *A. T. Lawrence*, and *Leslie*, for the defendant. The indorsement in this case was not originally a good special indorsement under Order III., r. 6. At the time the summons under Order XIV. is taken out there must be a good specially indorsed writ: *Gurney* v. *Small* (1); a fresh summons should therefore have been taken out after the indorsement was amended. The plaintiff's tackle must be in order when he takes out the summons: per Wills J. in *Paxton* v. *Baird.* (2) The decision in *Gurney* v. *Small* (1) is not touched by *Paxton* v. *Baird* (2), which only decides the point left open in the former case.

The amendment was improperly made, for where a writ is not specially indorsed in the first instance, leave is necessary to amend the indorsement. Under Order XXVIII., r. 2, a plaintiff

(1) [1891] 2 Q. B. 584. (2) [1893] 1 Q. B. 139.

may, without leave, amend his statement of claim, whether indorsed on the writ or not, once before reply; but here there was no statement of claim to amend, for an indorsement is not a statement of claim unless it is a special indorsement under Order III., r. 6. The plaintiff should therefore have obtained leave under Order XXVIII., r. 1, to amend his indorsement, or he should have had the amendment made on the hearing of the summons under Order XIV., r. 1 (*b*).

The plaintiff's affidavit was insufficient, for it did not verify the cause of action as it appeared on the amended indorsement. It cannot be taken as alleging that notice of dishonour was given.

[GRANTHAM J. The case of *May* v. *Chidley* (1) appears to negative this contention.]

T. W. Chitty, for the plaintiff. The amendment was properly made without leave, for the defect in the indorsement did not prevent its being a statement of claim within the meaning of Order XXVIII., r. 2. The present case does not fall within Order XIV., r. 1 (*b*), which applies where something is included in the indorsement which cannot be specially indorsed at all; it has no application to the case of a mere incomplete or defective special indorsement; such an indorsement is curable by amendment without leave. *Gurney* v. *Small* (2) and *Paxton* v. *Baird* (3) have nothing to do with the present case, although the latter decision is in the plaintiff's favour as far as it goes.

[He was stopped by the Court.]

Leslie, in reply.

POLLOCK B. In my judgment the order of the district registrar was right. I think that the contention on behalf of the plaintiff is sound, that an amendment might be made of the statement of claim indorsed on this writ before the expiration of the time limited for reply. The plaintiff was perfectly within his rights when he issued his writ; he issued it for a cause of action which could properly be indorsed on it with a view to proceedings under Order XIV. But, after he had taken out the

(1) [1894] 1 Q. B. 451. (2) [1891] 2 Q. B. 584.
(3) [1893] 1 Q. B. 139.

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summons under Order XIV. and had got his affidavit made, it was discovered that there was some informality in the indorsement. It may have been one that was material to the affidavit on the summons or it may not; but in either case it appears to me that the Court had perfect jurisdiction, and, the Court being once seised of the action, the plaintiff was entitled, without any leave under Order XXVIII., r. 2, to amend his statement of claim indorsed on the writ. Then, what are the consequences of the amendment? They are the same as they would be in any other case if the writ were deficient in the sense of not having averred some condition precedent or some date that was material to the cause of action; the amendment being made, the action would go on exactly in the same way as if the indorsement had been good from the beginning, subject, of course, to any amendment of affidavits or to any procedure on the part of the defendant that would be necessary to meet the exigencies of the case. That appears to me to be enough to decide this case.

But it is said that it was necessary to apply under Order XIV., r. 1 (*b*), because amendments are required in certain cases to be made under that rule. It is true that in cases where the plaintiff had asserted a claim which was not within Order XIV. at all (the common case being a claim of interest which could not be specially indorsed, and in respect of which the Court had no jurisdiction at all under Order XIV.) it was held that, if the plaintiff amended his writ, he must take out a fresh summons under Order XIV.; because at the time the original summons was taken out the writ was deficient, not merely in the sense of being demurrable on the ground that it did not disclose a complete cause of action, but in the sense that there was no more jurisdiction under Order XIV. to entertain an indorsement of an improper claim for interest than there would be to entertain a claim for damages for an assault or any other claim for unliquidated damages. In my opinion, neither the ground of, nor the necessity for making, the new rule, nor the ground upon which the previous decisions were arrived at, arise in the present case. I think that the amendment was properly made by the plaintiff without leave, and having made it he was entitled to go on with

his action in the ordinary way, and there being no merits in the defence there is no answer to the action.

GRANTHAM J. I am of the same opinion. When one appreciates the facts of this case and the nature of the proceedings that were taken, it seems to me that the whole of the argument founded on *Gurney* v. *Small* (1) and *Paxton* v. *Baird* (2) becomes unnecessary. A writ of summons was served, which was specially indorsed, and the defendant appeared to it, and thereupon there was power to make an application under Order XIV. It is true that before the summons came on the plaintiff amended his statement of claim, as he had a perfect right to do; still there was the old writ specially indorsed, and the district registrar was perfectly justified in hearing and determining the case. It was not even necessary to apply under Order XIV., r. 1 (*b*), which is the new rule and was in force when this matter came before the registrar. Under these circumstances, as far as technicalities were concerned, he was perfectly justified in hearing the application, and, no merits being sworn to or available, there is no answer to the application on that ground.

Appeal dismissed.

W. J. B.

The defendant appealed.

A. T. Lawrence, for the defendant. In order to constitute a special indorsement under Order III., rule 6, the indorsement must be "to the effect of such of the Forms in Appendix C, s. iv. as shall be applicable to the case." The form applicable, mutatis mutandis, is Form 5, inasmuch as the drawer of a cheque is by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73, in the position of the drawer of a bill of exchange. That form contains an averment of notice of dishonour. Notice of dishonour is part of the cause of action. Consequently there was no good special indorsement as the writ was originally framed, and on such a writ leave could not be given to enter judgment under Order XIV.: *Frühauf* v. *Grosvenor*. (3)

(1) [1891] 2 Q. B. 584. (2) [1893] 1 Q. B. 139.
(3) 61 L. J. (Q.B.) 717.

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The amendment did not get rid of the difficulty. First, the plaintiff had no right to make such an amendment without leave. Order XXVIII., r. 2, which allows the amendment of a statement of claim, whether indorsed on the writ or not, once without leave, does not apply, because under Order XX., r. 1, an indorsement, unless special, is not a statement of claim. This was not a good special indorsement. Order XXVIII., r. 2, only allows amendment of a good special indorsement in matters of detail, such as date, amount, &c. Secondly, it has been held that, in order to entitle the plaintiff to judgment under Order XIV., r. 1, there must be a good special indorsement at the time when the summons for leave to sign judgment under Order XIV. is taken out: *Gurney* v. *Small.* (1) The plaintiff ought to have taken out a fresh summons after the amendment. *Paxton* v. *Baird* (2) is distinguishable. In that case the only question was whether the appearance was to a specially indorsed writ, and the summons was taken out after the amendment.

The affidavit verifying the cause of action is insufficient. At the time when it was sworn, the indorsement on the writ contained no statement as to notice of dishonour, and the cause of action is verified by reference to the indorsement. Therefore the affidavit cannot be read as averring by implication notice of dishonour, and does not verify an essential part of the cause of action.

[LOPES L.J. referred to *May* v. *Chidley.* (3)]

It has often been said by the Courts that, the provisions of Order XIV. being of a stringent nature and taking from the defendant what would be his ordinary right, the conditions which they impose must be strictly performed.

T. Willes Chitty, for the plaintiff. The affidavit states that the defendant admitted liability before action brought, and promised payment. The cases shew that such an admission is evidence of notice of dishonour or waiver of it: *Cordery* v. *Colville* (4); *Woods* v. *Dean.* (5) The defendant has not denied that statement. [He was stopped by the Court.]

(1) [1891] 2 Q. B. 584.
(2) [1893] 1 Q. B. 139.
(3) [1894] 1 Q. B. 451.
(4) 32 L. J. (C.P.) 210.
(5) 32 L. J. (Q.B.) 1.

A. T. Lawrence, in reply. The paragraph in the affidavit on which reliance has been placed does not shew that the defendant admitted liability on the cheque. It is compatible with it that, the admission was merely of liability for some debt which formed the consideration for the cheque.

LORD ESHER M.R. The substance of Order XIV. is that where, with reference to a claim within Order III., r. 6, the plaintiff can shew to the satisfaction of the judge that he has a clear case against the defendant, which the defendant cannot possibly answer, the judge may give the plaintiff leave to enter judgment forthwith, without the expense and delay which would be involved in letting the case go on to trial in the ordinary way. That is a stringent power to give, and therefore the Courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within the scope of the provisions of the order; but that does not mean that effect will be given to every unsubstantial technicality that may be set up by way of objection to proceedings under the order. The meaning is that care must be taken to see that the plaintiff has, in accordance with the terms of the order, made out a cause of action to which the defendant can have no possible defence.

In the present case it is clear that the defendant gave the plaintiff a cheque upon his bankers which was dishonoured. The defendant does not deny that he is indebted to the plaintiff in the amount of the cheque, but he sets up a number of technical difficulties. He says that, when the writ was issued, the plaintiff had not brought himself within the terms of Order XIV., because he had not indorsed on the writ a complete cause of action, not having stated that notice of dishonour was given. It was argued that there was no power of amendment before adjudication on the summons taken out; but the proceedings must be commenced afresh, thereby causing useless expense. In my opinion, the power of amendment in this case is just the same as in any other case. An amendment ought not to be allowed if it will occasion injustice; but if it can do no injustice, and will only save expense, it ought to be made. It was said that under the circumstances of the case the amendment could not be made without

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leave. I can see no ground for that contention. I think the plaintiff was entitled to make the amendment. Therefore, when the case came before the tribunal for adjudication under Order XIV., the special indorsement was in due form. The defendant, who cannot deny that he owes the money, says that a fresh summons ought to have been taken out after the amendment. Could there possibly be a more frivolous technicality? The result would be a mere waste of money.

Then the point is taken that the affidavit verifying the cause of action is insufficient. It is not necessary to decide the question whether the general statement in the first paragraph of the affidavit, which refers to the particulars indorsed on the writ, would have been sufficient, having regard to the fact that the indorsement as originally drawn did not allege notice of dishonour. The affidavit contains an allegation, as one of the reasons why there could be no defence, that after the dishonour of the cheque the defendant admitted his liability, and promised to pay the amount by instalments. It is suggested that the allegation so made only imports that the defendant admitted liability on the consideration for the cheque, not on the cheque. But that suggestion appears to me frivolous. It has been held that, if a person who has drawn a cheque after dishonour of it makes such a promise to pay as is here alleged, that promise does away with the necessity for proving notice of dishonour, and is equivalent to an admission that such notice has been given. Such a statement unanswered shews that there can be no possible defence to the action. Therefore, I think that the decision of the Divisional Court was right, and this appeal must be dismissed.

LOPES L.J. I agree. No one feels more strongly than I do that proceedings under Order XIV. require to be carefully watched in order to see that the particular case comes within the scope of the order. The meaning of the order is, that in a certain class of cases, where the plaintiff has a clear case, he ought not to be subjected to the expense and delay of going to trial, but ought to be allowed to sign judgment summarily; and therefore, where the plaintiff shews that he has a good cause of

action, and the defendant cannot make out that he has any plausible ground of defence, the plaintiff is entitled to judgment provided that his claim is one which comes within the terms of the order.

The first objection taken here is as to the amendment of the indorsement on the writ. That indorsement as originally framed did not state that there had been notice of dishonour. It was said that there was therefore no good special indorsement. After the case came before the registrar on the first occasion, and before he adjudicated upon it, the plaintiff amended the defect in the writ. It is argued that that amendment was not properly made. It appears to me that it was: and I venture to think that the judge before whom such a case comes for adjudication would, upon the objection being taken, have power to make such an amendment if he thought it just.

Then an objection was taken to the plaintiff's affidavit. I agree that the affidavit must sufficiently verify the cause of action—that is to say, it must state such facts as are necessary to establish a good cause of action; it will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part of it. It was argued that this affidavit was insufficient, because it only verified the facts that the cheque was given and dishonoured, and did not state that there had been notice of dishonour. At one time I was impressed by this argument, because I think that the affidavit must be looked at with reference to the time when it was sworn, and the state of things then existing. But in this affidavit, which was before the registrar, there is a statement of a distinct admission by the defendant that he owed the money, and a promise to pay it by instalments. It was contended that this only applied to the debt for which the cheque was given, and not to the liability on the cheque. That seems to me an idle contention. I read the affidavit as alleging an unqualified admission of liability on the cheque. That being so, the registrar had before him uncontradicted evidence of that which according to the cases dispenses with proof of the notice of dishonour. It seems to me, therefore, that the affidavit was amply sufficient to justify the order that was made.

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RIGBY L.J. I am of the same opinion. For some time I felt a difficulty with regard to this affidavit. Having regard to the fact that it was sworn before the amendment of the indorsement on the writ, I thought it might be consistent with the terms of the affidavit that the defendant did not intend to allege the existence of notice of dishonour. But, on looking more carefully at the affidavit, it appears that the second paragraph of it states that before action the defendant wrote to the plaintiff acknowledging his liability, and offering to pay the amount by instalments. I do not think that it can be seriously contended that the admission so stated to have been made must be taken to refer to some other liability, and not that on the cheque. That statement in the affidavit appears to me to meet all that is substantial in the objections taken to the order of the registrar. For I think that the matter of form could be amended, and on this affidavit there would be no question according to the authorities that either there had been a notice of dishonour or a waiver of it.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *C. Robinson & Co.*

Solicitors for defendant: *T. A. Dennison & Co., for Plant, Dudley.*

E. L.

SINGLETON, APPELLANT; ELLISON, RESPONDENT. 1895 Feb. 7.

Criminal Law—Nuisance—Keeping a "Brothel"—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 13, *sub-s.* 1—*Suppression of Brothels.*

A woman occupied a house frequented by day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for purposes of prostitution:—

Held, that she had not committed the offence of "keeping a brothel" within the meaning of the Criminal Law Amendment Act, 1885, s. 13, sub-s. 1.

CASE stated under the Summary Jurisdiction Acts by four justices of the peace for the borough of Preston, sitting as a court of summary jurisdiction.

An information was preferred before the justices by the appellant, charging that the respondent, a woman, unlawfully kept a brothel within the borough of Preston, contrary to s. 13, sub-s. 1, of the Criminal Law Amendment Act, 1885.

At the hearing of the information it was proved that the respondent, between the dates specified therein, occupied a house within the borough; that the house was frequented by a number of men by day and night, but principally by night, and that fornication and indecent acts were seen to have taken place between some of the men and the respondent. There was evidence that the respondent received money from men who so frequented her house.

The justices found that no woman other than the respondent lived at, visited, frequented, or used the house for the purposes of prostitution, and on that ground they were of opinion that it was not a brothel within the meaning of the statute, and dismissed the information.

The question for the opinion of the Court was whether, on the facts proved before them, the justices' decision was correct in point of law.

George Elliott, for the appellant. The justices came to a wrong conclusion upon the facts stated in the case. If premises are used for the purposes of prostitution the person who keeps them keeps a brothel within the meaning of the Criminal Law

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Amendment Act, 1885, s. 13, sub-s. 1 (1), and the fact that there is only one woman on the premises is immaterial. In Stephen's Digest of the Criminal Law, 5th ed. p. 142, the definition of a "common bawdy house" is "a house or room, or set of rooms, in any house kept for purposes of prostitution." In 2 Hawk. P. C., bk. i. c. 74 (7th ed. by Leach, p. 135), it is said, "a lodger who keeps only a single room for the use of bawdry is indictable for keeping a bawdy house"; and *Reg.* v. *Peirson* (2) decides the same thing. *Reg.* v. *Justices of Holland* (3) is distinguishable from the present case. The point there was whether one instance of persons being seen to enter the house would be sufficient evidence.

Frank H. Mellor, for the respondent, was not required to argue.

WILLS J. I am of opinion that the decision of the magistrates was right. A brothel is the same thing as a "bawdy house"—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men. Our judgment must be for the respondent.

WRIGHT J. I agree.

Judgment for the respondent.

Solicitor for appellant: *David Nimmo.*

Solicitors for respondent: *Kime & Hammond, for W. & A. Blackhurst, Preston.*

(1) Sect. 13, sub-s. 1: "Any person who (1.) keeps or manages or acts or assists in the management of a brothel . . . . shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable" to fine or imprisonment as therein provided.

(2) 2 Ld. Raym. 1197.

(3) 46 J. P. 312.

W. A.

[IN THE COURT OF APPEAL.]

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Feb. 22.

IN RE A BANKRUPTCY NOTICE. EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Order made upon Motion in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

An order made upon a motion in a bankruptcy, declaring an assignment of property by the bankrupt in favour of a stranger to the bankruptcy to be void as against the trustee in the bankruptcy, and directing the assignee to pay the costs of the motion, is not a "final judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of the costs.

APPEAL ex parte by the official receiver, as trustee in the bankruptcy of G. D. Bowie, from the refusal of one of the bankruptcy registrars to issue a bankruptcy notice against Charles Bassett.

The official receiver, as trustee in the bankruptcy, applied to the Court, by motion under s. 102 of the Bankruptcy Act, 1883, and rule 27 of the Bankruptcy Rules, 1886, for an order declaring that a deed, dated April 11, 1893, by which Bowie had assigned some letters patent to Bassett, was fraudulent and void as against the trustee in Bowie's bankruptcy, and setting aside the same. Upon this motion an order was made by Vaughan Williams J., declaring the deed of assignment fraudulent and void as against the trustee, and that the letters patent belonged to the trustee. And it was ordered that the deed should be set aside, and that Bassett should forthwith hand over to the trustee the deed of assignment and the letters patent, that an account and inquiry should be taken before the registrar of all moneys received by Bassett, and of all dealings had by him for or in respect of the letters patent, and that what upon the taking of such account should appear to be due by Bassett should be forthwith paid by him to the trustee, and that Bassett should forthwith execute and sign all necessary deeds and writings for vesting the letters patent in the trustee, and that Bassett should pay to the trustee his taxed costs of the motion.

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IN RE A BANKRUPTCY NOTICE. EX PARTE OFFICIAL RECEIVER.

The trustee's costs were taxed at 30*l.* 13*s.* 6*d.*, and it was in respect of this sum, which had not been paid, that the trustee applied for the issue of a bankruptcy notice against Bassett.

The registrar refused to issue the notice, on the ground that an order upon a motion in bankruptcy was not a "final judgment" in an action, and that, consequently, sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, did not apply.

Muir Mackenzie, for the official receiver. A motion in a bankruptcy by the trustee against a stranger to the bankruptcy is a substitute for an action against that person. Such a motion is made under the power conferred by s. 102, sub-s. 1, of the Bankruptcy Act, 1883, upon "every Court having jurisdiction in bankruptcy," "to decide all questions of priorities, and all other questions whatsoever whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

By rule 27 of the Bankruptcy Rules, 1886, every application to the Court (unless otherwise directed) is to be made by motion. The order made upon such a motion is a substitute for and is equivalent to a "final judgment" in an action: *In re Rathbone.* (1) Sect. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, enables a creditor who "has obtained a final judgment" to issue a bankruptcy notice against the judgment debtor, but it does not say that the judgment must have been obtained in an action in the strictest sense of the word.

[LOPES L.J. referred to *In re Binstead* (2); *Ex parte Whinney.* (3)

LORD ESHER M.R. referred to *Ex parte Chinery.* (4)]

In *Ex parte Moore* (5), Lord Selborne said (at p. 632): "To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits."

(1) 56 L. J. (Q.B.) 504.
(2) [1893] 1 Q. B. 199.
(3) 13 Q. B. D. 476.
(4) 12 Q. B. D. 342.
(5) 14 Q. B. D. 627.

LORD ESHER M.R. In my opinion the authorities are clearly against the appellant. They decide that the "final judgment" referred to in s. 4, sub-s. 1 (*g*), must be a judgment in an action.

LOPES L.J. I am of the same opinion. This order is clearly not a judgment in an action. We have held that this sub-section is to be construed strictly, and we should be contradicting our former decisions if we were now to say that this order is a final judgment within the meaning of sub-s. 1 (*g*).

RIGBY L.J. No doubt this order is a final one, and it is very like a judgment. But it is certainly not a judgment in an action, and, according to the former decisions of this Court, the "final judgment" spoken of by sub-s. 1 (*g*) must be a judgment in an action.

Appeal dismissed.

Solicitor: *Sydney R. Pollard.*

W. L. C.

[IN THE COURT OF APPEAL.]

IN RE BOYD. EX PARTE McDERMOTT.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Action upon Order for payment of Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

An interlocutory order having been made by the Court of Appeal for the payment of costs by an appellant in an action in the Queen's Bench Division, the respondent brought an action against the appellant for the taxed amount of the costs, and obtained judgment for default of appearance:—

Held, that although a bankruptcy notice could not have been issued against the appellant upon the order for payment of costs, yet such a notice could be issued upon the judgment, it being a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

Dictum of Cave J. in *Re Shirley* (58 L. T. (N.S.) 237) disapproved.

APPEAL by E. R. McDermott from an order made by one of the bankruptcy registrars, setting aside a bankruptcy notice which the appellant had issued against R. N. Boyd.

In February, 1894, Boyd commenced an action in the Queen's

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IN RE BOYD. EX PARTE MCDERMOTT.

Bench Division against McDermott and other defendants, claiming damages for an alleged conspiracy. Each of the defendants took out a summons to dismiss the action as being frivolous and vexatious. The summonses were, by an order of the Lord Chancellor, transferred to North J. for hearing, on the ground that he was familiar with some former proceedings relating to the same matters. On July 19, 1894, North J. made an order dismissing the action as against McDermott with costs, on the ground that it was frivolous and vexatious. Similar orders were made as regarded the other defendants. Boyd gave notice of appeal against these orders. The defendants applied to Lord Russell C.J., who was sitting in Vacation as a judge of the Court of Appeal, for security for the costs of the appeal, and an order was made that the plaintiff should give security to each defendant in the sum of 100*l.* The plaintiff applied to the Court of Appeal to discharge this order, and his application was refused, and he was ordered to pay the taxed costs of each defendant of the appeal. The costs of McDermottt were taxed at 62*l.* 16*s.* 4*d.*

Not being able to obtain payment of this sum McDermott, on November 8, 1894, issued a writ against Boyd in the Queen's Bench Division for the amount. Boyd did not appear to the writ, and on November 19, 1894, the plaintiff recovered judgment against him in default of appearance for 62*l.* 16*s.* 4*d.* and 4*l.* 14*s.* costs.

On November 24, 1894, McDermott issued a bankruptcy notice against Boyd in respect of the 67*l.* 10*s.* 4*d.* Boyd applied to the Court to set aside the notice, and the registrar made an order setting it aside, on the ground "that the judgment on which the notice was issued was not a final judgment within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883." The registrar thought that he was bound so to hold by reason of what was said by Cave J. in *Re Shirley*. (1) In that case Cave J. said (p. 238): "Under the Bankruptcy Act a notice can be served only in respect of a final judgment, and if you can sue on a balance order you can get round the provisions of s. 4. Take this case. A suitor gets an interlocutory order for costs, on which he issues a writ and gets judgment under Order XIV., and

(1) 58 L. T. (N.S.) 237.

then issues a bankruptcy notice, though he could not do so on the interlocutory judgment. How very mischievous this would be. I entertain very grave doubts, and I think for this and other reasons the Court is justified in dismissing a petition, surrounded as this is with so many irregularities, and founded on a judgment of so doubtful a character."

Herbert Reed, Q.C., and *Pollard*, for the appellant. The registrar thought that the Queen's Bench Division had no jurisdiction in the matter, and that you could not bring an action and obtain judgment upon an order for the payment of costs. Such an action is perfectly legitimate: *Philpott* v. *Lehain.* (1) At any rate, there was a "final judgment" of the Queen's Bench Division, and the requirements of s. 4, sub-s. 1 (*g*), were complied with. The registrar was not entitled, upon an application to set aside the bankruptcy notice, to go behind the judgment and inquire into its validity: *In re Easton.* (2) If the so-called judgment were on the face of it not a judgment, it would be a wholly different matter. But, even if the registrar were hearing a petition for a receiving order, he could go behind the judgment only for the purpose of inquiring whether there was a real debt. In the present case there can be no doubt about the validity of the debt. The bankruptcy notice is a proceeding only against the debtor himself, and he cannot dispute the validity of the judgment: *In re Russell.* (3) The registrar relied on *Re Shirley* (4); but there the question was as to the right to present a bankruptcy petition, and the observations of Cave J. were only dicta.

Turrell, for the debtor. It cannot be disputed that the judgment is in form a "final judgment"; but, having regard to what was said by Cave J. in *Re Shirley* (4), a bankruptcy notice ought not to be issued in respect of it, because such a notice could not have been issued in respect of the order for payment of costs. The judgment is a mere device to evade the construction which this Court has given to sub-s. 1 (*g*) of s. 4. The objection was not taken prematurely. If a receiving order ought not to be

(1) 35 L. T. (N.S.) 855.
(2) 10 Morrell's Bank. Rep. 111.
(3) 5 Morrell's Bank. Rep. 258.
(4) 58 L. T. (N.S.) 237.

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IN RE BOYD. EX PARTE MCDERMOTT.

made, the sooner a stop is put to the bankruptcy proceedings the better.

[The counsel for both parties concurred in requesting the Court to decide whether there was a debt which would support a receiving order.]

LORD ESHER M.R. An order was made by the Court of Appeal against the respondent Boyd for the payment of costs. He was bound to obey that order. The appellant could not serve him with a bankruptcy notice for the amount, because the order was not a "final judgment." Finding himself in this position, the appellant issued a writ upon the order—that is, for the recovery of the sum which the respondent had been ordered to pay. It is not and cannot be denied that the appellant had a legal right to do that. The writ was served on Boyd and he did not appear, and thereupon the appellant obtained a judgment against him by default. The respondent could not help the judgment going against him, and the best thing he could do was not to appear, and he did not appear. The judgment was none the less effective because of his non-appearance. There was therefore a valid judgment against him until it was set aside. It could only be questioned in the Court of Bankruptcy, and the debtor has not yet got into that Court. What is the right of a creditor who has obtained a valid final judgment in his favour? He has a right to serve a bankruptcy notice on the debtor, and so in effect to say to him, "Pay me the sum which is due on the judgment within seven days, or if you do not you will be liable to be made a bankrupt." The bankruptcy notice is perfectly good, and, if the debtor does not pay the money within seven days, he commits an act of bankruptcy, upon which a receiving order can be made against him. When the case gets into bankruptcy, the Court of Bankruptcy can do what no other Court can: it can go behind the judgment, and, if it finds that there was no real debt, no cause of action to support the judgment, it will not allow the judgment creditor to prove in the bankruptcy. But in the present case, when you look behind the judgment and see that it was founded on the order of this Court for payment of costs, it is clear that there was a debt, and a right of action. The debt

is the amount of the costs which the respondent was ordered to pay, and, if he does not pay it, he is liable to be made a bankrupt. The objection to the bankruptcy notice is based entirely upon the dictum of Cave J. in *Re Shirley* (1), and I am bound to say that I do not agree with him, and his dictum must be treated as overruled.

LOPES L.J. I am of the same opinion. The case is a simple one. An interlocutory order was made in this Court, directing certain costs to be paid by the respondent. Beyond all question, upon that interlocutory order a bankruptcy notice could not issue. In fact, an application made to the Bankruptcy Court for the issue of a bankruptcy notice was refused. Thereupon a writ was issued against the respondent for the amount of the costs, and he failed to appear to that writ, and for this very good reason, that he had no possible defence to the action. Thereupon judgment was signed against him for default of appearance. Beyond all question it was a "final judgment," and, indeed, this is not disputed. That being so, the Bankruptcy Court has power to do that which no other Court can, namely, when an application is made to it for a receiving order against the debtor, it can look behind the judgment, or, in other words, notwithstanding the judgment, it can inquire whether there is a good debt upon which the judgment is founded. Now in the present case, if the Court went behind the judgment, it would find that there is a good and substantial debt. Here, then, there is a final judgment, and the usual and proper bankruptcy notice under sub-s. 1 (*g*) of s. 4 has been issued, and the registrar was wrong in setting aside the notice. The appeal must consequently be allowed. With regard to what was said by Cave J. in *Re Shirley* (1), I ought to add that I do not concur in his view.

RIGBY L.J. I am of the same opinion, and I have nothing to add.

Appeal allowed.

Solicitors: *Hores & Pattisson; W. C. Goulding.*

(1) 58 L. T. (N.S.) 237.

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Jan. 11, 12, 26.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* JUSTICES OF LONDON.

Licensing Acts—Refusal to renew Licence—Appeal to Quarter Sessions—Costs of Licensing Justices opposing Appeal—Discretion of Quarter Sessions—Mandamus—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Summary Jurisdiction Acts*, 1848, 1879, 1884 (11 *&* 12 *Vict. c.* 43, *s.* 27; 42 *&* 43 *Vict. c.* 49, *ss.* 31, 32, 55; 47 *&* 48 *Vict. c.* 43, *s.* 6)—*Quarter Sessions Act*, 1849 (12 *&* 13 *Vict. c.* 45), *ss.* 5, 6—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 13, *sub-s.* 11.

By the Alehouse Act, 1828, s. 29, where an appeal from an order of any justice under that Act is dismissed, "it shall be lawful for the Court to whom such appeal shall have been made . . . . and such Court is hereby required to adjudge and order" that the appellant shall pay to the justice "such sum by way of costs as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal."

By the Summary Jurisdiction Acts, 1848, 1879, and 1884, and the Quarter Sessions Act, 1849, other provisions are made relating to costs of appeals, and all Acts inconsistent with the Summary Jurisdiction Act, 1879, are repealed:—

Held, that, as regards an appeal against the refusal to renew a licence, the above provision of s. 29 has not been repealed by subsequent legislation, but that it does not apply to the costs of justices who make themselves "parties" to an appeal, within the meaning of s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, by taking an active part in opposing the appeal:

Held, further, that when an appeal is dismissed the Court of quarter sessions has a discretion as to the costs of justices who thus make themselves "parties" to the appeal, and that, if they have exercised their discretion by refusing to give the costs of the appeal to licensing justices, the High Court cannot interfere by mandamus.

Decision of Queen's Bench Division, ante, p. 214, affirmed.

APPEAL by the licensing justices for the Tower Division of the county of London against a decision of a Divisional Court (Pollock B. and Grantham J.). (1)

An order nisi had been obtained calling on the justices of the county of London to shew cause why a writ of mandamus should not issue, commanding them to hear and determine according to law, and pursuant to the statutes in that behalf, the matter of an application by the justices acting for the Tower Division, who

(1) Ante, p. 214.

had been served with notice of an appeal to quarter sessions by Frederick John Magerkorth, for an order adjudging that Magerkorth, the appellant, should pay to the justices of the Tower Division such sum by way of indemnity for costs and charges of the appeal as the court of quarter sessions might think fit.

The facts, as stated on affidavit, were as follows.

At the general annual licensing meeting the occupier and licensee of a public-house applied to the justices of the Tower Division for the renewal of a licence to sell exciseable liquors by retail to be consumed on the premises. The justices refused to grant a renewal of the licence, and Magerkorth, as freeholder of the public-house, appealed to quarter sessions against the refusal. The licensing justices were served with notice of the appeal, and on the hearing counsel instructed by them appeared on their behalf and argued against the appeal.

The appeal was dismissed, and an application was made on behalf of the licensing justices to the court of quarter sessions to order that the appellant should pay to the justices such a sum by way of costs as should, in the opinion of the Court, be sufficient to indemnify the justices from all costs and charges to which they had been put in consequence of the appeal; but the Court refused to order the appellant to pay any costs.

On cause being shewn against the mandamus the Divisional Court discharged the order nisi, on the ground that the quarter sessions had a discretion as to the costs, and that they had exercised their discretion.

The licensing justices appealed.

Jelf, *Q.C.*, and *Avory*, for the appellants. Sect. 29 of the Alehouse Act, 1828 (1), confers upon justices, against whom an

(1) By s. 27 of the Act, "Any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this Act," may appeal to quarter sessions, "provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session . . . . and the Court at such session shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said Court shall seem meet."

By s. 29, "In every case where

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appeal has been brought in relation to the Act, an absolute right to their costs if the appeal is dismissed. The justices at

notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the Court to whom such appeal shall have been made or intended to be made, and such Court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal"; — with power to commit to prison until payment. The Licensing Act, 1872 (35 & 36 Vict. c. 94), by s. 75 repealed ss. 27, 28, and 29 of 9 Geo. 4, c. 61, except in so far as they "relate to the renewal of licences, or to the transfer of licences, under ss. 4 and 14 of the same Act."

By the Summary Jurisdiction Act, 1879, s. 31, "Where any person is authorized, by this Act, or by any future Act, to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such Court, subject to the conditions and regulations following" (inter alia):—

(2.) "The appellant shall, within the prescribed time, ... give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction, notice in writing of his intention to appeal."

(5.) "The Court of Appeal, ... upon the hearing of the appeal, may confirm, reverse, or modify the decision of the court of summary jurisdiction. The Court of Appeal may also make such order as to costs to be paid by either party as the Court may think just."

By s. 32: "Where a person is authorized by any past Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such Court, subject to the conditions and regulations contained in this Act, with respect to an appeal to a court of general or quarter sessions:

"Provided that where any such appeal is in accordance with the conditions and regulations prescribed by the Act authorizing the appeal, so far as the same is unrepealed, such appeal shall not be deemed invalid by reason only that it is not in accordance with the conditions and regulations contained in this Act."

The Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), by s. 4 repealed the words "by this Act or by any future Act"; in sect. 31 of the Summary Jurisdiction Act, 1879, and also repealed s. 32 of the same Act, down to the words "in accordance with the conditions and regulations contained in this Act."

By s. 6: "Where a person is authorized by any Act passed before the commencement of the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a Court of summary jurisdiction made in pur-

quarter sessions had, therefore, no jurisdiction under that Act to deprive the licensing justices, who were successful in opposing the appeal, of their costs. The quarter sessions have exceeded their jurisdiction, and a mandamus will lie against them.

Assuming s. 29 of the Alehouse Act, 1828, to be still in force, the justices at quarter sessions, having no jurisdiction to refuse costs, cannot give themselves jurisdiction by misconstruing the enactments by which their procedure is regulated. If they exercise their jurisdiction wrongly, a mandamus will not lie; but if they come to a wrong decision on the question whether they have jurisdiction or not, it will. It is not sufficient that they may have heard and determined the matter if they have not heard and determined it according to law: *Reg.* v. *Justices of Monmouthshire* (1); *Reg.* v. *Edlin* (2); *Reg.* v. *Newton* (3); *Reg.* v. *King* (4); *Rex* v. *Justices of West Riding of Yorkshire* (5); *Reg.* v. *Scott* (6); *Reg.* v. *Justices of West Riding of Yorkshire* (7); *Reg.* v. *Adamson.* (8)

With regard to the merits, it is said that s. 29 of the Alehouse Act, 1828, has been impliedly repealed by 12 & 13 Vict. c. 45, s. 5, and the Summary Jurisdiction Act, 1879, s. 31, sub-s. 5, as amended and explained by the Summary Jurisdiction Act, 1884, ss. 6, 7, and the Interpretation Act, 1889, s. 13, sub-s. 11. Sect. 5 of 12 & 13 Vict. c. 45, gives a general power

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suance of the Summary Jurisdiction Acts, or from the refusal to make any conviction or order in pursuance of those Acts, to a court of general or quarter sessions, he shall, after the passing of this Act, appeal to such Court subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879, with respect to an appeal to a court of general or quarter sessions."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 66: "All costs incurred by the quarter sessions or the justices out of session of a county, and all costs incurred by any justice, in defending any legal proceedings taken against him in respect of any order made, or act done, in the execution of his duty as such justice, shall, to such amount as may be sanctioned by the standing joint committee of the county council and quarter sessions, and, so far as they are not otherwise provided for, be paid out of the county fund of the county."

(1) 1 D. & L. 145.
(2) 65 L. T. (N.S.) 83.
(3) [1892] 1 Q. B. 648.
(4) 20 Q. B. D. 430.
(5) 2 B. & C. 228.
(6) 22 Q. B. D. 481.
(7) 2 B. & S. 811.
(8) 1 Q. B. D. 201.

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to the justices at quarter sessions to give costs in all cases of appeal; but it has been held that that enactment does not affect a provision in a previous statute establishing a special mode of paying costs: *Reg.* v. *Huntley.* (1)

It follows that that general enactment does not impliedly repeal the special provisions of s. 29 of the Alehouse Act, 1828.

By s. 31 of the Summary Jurisdiction Act, 1879, which regulates the procedure on appeal to quarter sessions, the Court is empowered (sub-s. 5) to "make such order as to costs to be paid by either party as the Court may think just"; and it has been held that justices acting under the provisions of the Alehouse Act, 1828, are, for some purposes, a court of summary jurisdiction, within the Act of 1879, as explained by the Act of 1884 and the Act of 1889: *Reg.* v. *Justices of Glamorganshire* (2); but the Court expressly guarded itself against such an interpretation in any case which would involve injustice, inconsistency, or absurdity. A general provision in a general procedure Act will not repeal by implication a special privilege conferred upon a special class of persons; nor is there any such inconsistency between the provision of s. 29 of the Alehouse Act, 1828, and the general power given by s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, as to warrant an implied repeal: *Garnett* v. *Bradley.* (3)

But for the Summary Jurisdiction Act, 1884, the Act of 1879 could have had no application to the present case. But the object of the Act of 1884 is stated to be to make further provision for the uniformity of proceedings before courts of summary jurisdiction, and for that purpose a number of enactments are expressly repealed; yet the special privilege conferred by s. 29 of the Alehouse Act, 1828, is not included in the repealed enactments, and in the Licensing Act, 1872, s. 29 is expressly dealt with, and partially repealed; but the provision in favour of the justices, when dealing with the renewal or transfer of licences, is left standing. Further, the licensing justices are not "parties" within sub-s. 5 of s. 31 of the Act of 1879: *Rex* v.

(1) 23 L. J. (M.C.) 106. (2) [1892] 1 Q. B. 621.
(3) 3 App. Cas. 944, 950.

Justices of Hants (1); *Reg.* v. *Davidson* (2); *Reg.* v. *Goodall.* (3) The costs to which the licensing justices are entitled under s. 29 of the Act of 1828 are to be sufficient to indemnify them completely, i.e., they are indemnity costs, and such costs are not included in the general provisions of the Act of 1879. It is further provided by s. 29 that if the licensing justices fail, and the appeal against them is allowed, the treasurer of the county may be ordered to pay their costs; it follows therefore that, if the respondents are right, licensing justices against whom an appeal is brought may be in a better position as regards costs if they fail on the appeal than if they succeed.

The privileges conferred upon the licensing justices by s. 29 remain unaffected by subsequent legislation, and the rule nisi for a mandamus ought to have been made absolute.

Poland, Q.C., and *Danckwerts*, for the respondents, the justices of the county of London. 1. Upon the true construction of the various Acts, the justices at quarter sessions had a discretion to deprive the licensing justices of costs. Sect. 29 of the Alehouse Act, 1828, is an arbitrary enactment, and enables the Court to enforce payment of costs by imprisoning the appellant for an indefinite time, and it deserves no special favour. *Reg.* v. *Hellier* (4) shews that when a subsequent Act is inconsistent with it, it impliedly repeals it. It was there held that an order made under s. 29 to imprison the appellant until the costs of his appeal should be paid was bad, although complying with the terms of the section, because that section was impliedly repealed by s. 27 of 11 & 12 Vict. c. 43, which limited the term of imprisonment to three months, and it was further held that s. 34 of the Act of 1828, which took away certiorari, was controlled by s. 18 of 12 & 13 Vict. c. 45, which provided for the removal of any order made at quarter sessions to the Court of Queen's Bench for the purpose of enforcing execution.

[A. L. SMITH L.J. That decision only shews that s. 29 was impliedly repealed so far as it related to the mode of enforcing payment of costs; it has nothing to do with the question what costs are to be imposed.]

(1) 1 B. & Ad. 654.
(2) 24 L. T. (N.S.) 22.
(3) Law Rep. 9 Q. B. 557.
(4) 17 Q. B. 229.

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Under s. 31 of the Summary Jurisdiction Act, 1879, as amended and explained by the subsequent Acts, the licensing justices are a court of summary jurisdiction, and their refusal to renew a licence is an order of such Court; therefore the provisions of that section apply from beginning to end. There is no reason why licensing matters should not be placed on the same footing as all other matters relating to summary jurisdiction.

It is objected that s. 29 is not expressly repealed by the Act of 1879; but the same argument would apply to the implied repeal of the section by s. 27 of 11 & 12 Vict. c. 43, which also expressly repealed a number of statutes.

It cannot be said that the licensing justices are not parties within s. 31, and in this case they were the sole respondents to the appeal.

2. But assume that the justices at quarter sessions were wrong, they have considered the matter, and they have come to an erroneous conclusion upon a point of law. It is not as though they had refused to entertain the matter; they have not declined any jurisdiction. This is an attempt to compel them to give a particular judgment, and no mandamus will lie in such a case: *Rex* v. *Inhabitants of Frieston* (1); *Rex* v. *Justices of Monmouthshire* (2), approved in *Ex parte Evans* (3); *Reg.* v. *Goodrich* (4), overruling *Rex* v. *Justices of Cumberland* (5), where a mandamus had been granted against justices who had determined a question within their jurisdiction; *Reg.* v. *Blanshard* (6); *Ex parte the Overseers of the Township of Ackworth* (7); *Reg.* v. *Justices of Middlesex.* (8)

This Court is not a court of appeal from quarter sessions; it will interfere by mandamus only if the justices have declined to exercise their jurisdiction. If the justices are wrong in their construction of the statutes, the only remedy would be to ask them to state a case for the opinion of the Queen's Bench Division. They were not asked to do this, and a mandamus will not lie to compel them to state a case: *Reg.* v. *Justices of Middle-*

(1) 5 B. & Ad. 597.
(2) 4 B. & C. 844.
(3) [1894] A. C. 16, 20.
(4) 19 L. J. (Q.B.) 413.
(5) 4 A. & E. 695.
(6) 13 Q. B. 318.
(7) 13 L. J. (M.C.) 38.
(8) 9 A. & E. 540.

sex (1); *Reg.* v. *Mainwaring* (2); *Reg.* v. *Justices of Bristol* (3); *Rex* v. *Justices of West Riding of Yorkshire* (4); *Reg.* v. *Richards* (5); *Ex parte Cook* (6); *Reg.* v. *Justices of Monmouthshire.* (7)

[LINDLEY L.J. referred to *Brooke* v. *Ewers.* (8)]

In *Reg.* v. *Justices of West Riding of Yorkshire* (9), a statute expressly gave costs to an appellant, and the justices had refused to hear his application for costs, and for this reason a mandamus was granted. In the present case the justices did not decline to hear the application, but they heard it and refused it. In *Reg.* v. *Edlin* (10) the justices had clearly declined jurisdiction. In *Reg.* v. *Adamson* (11) the justices had not exercised their discretion. In *Reg.* v. *Newton* (12) the point was not taken that a mandamus would not lie, and in fact the magistrate had declined jurisdiction. *In Reg.* v. *King* (13) the ground of the decision was that the justices had declined jurisdiction. In the present case the justices heard the matter fully argued by counsel on both sides, and it cannot, therefore, be said that they did not hear and determine it.

Sect. 27 imposes no obligation on the justices to appear on the hearing of an appeal when they are made respondents. If they do not appear, they will incur no costs to which s. 29 can apply. If they do not appear, and costs are given against them, they can, under the second part of s. 29, obtain payment of those costs out of the county fund. Whether they do or do not appear, they run no risk as to costs. The first part of s. 29 is, no doubt, in its terms obligatory; but no remedy is given to the justices in case of non-payment of their costs by an insolvent appellant, so that the protection afforded to justices is not a very valuable one; and under the second part of s. 29 the quarter sessions have a discretion as to costs. Having regard to s. 66 of the Local Government Act, 1888, the contest is really whether the costs

(1) 2 Q. B. D. 516.
(2) E. B. & E. 474.
(3) 3 E. & B. 479 (note).
(4) 1 A. & E. 563.
(5) 20 L. J. (Q.B.) 351.
(6) 2 E. & E. 586.
(7) 1 D. & L. 145.
(8) Str. 113.
(9) 2 B. & S. 811.
(10) 65 L. T. (N.S.) 83.
(11) 1 Q. B. D. 201.
(12) [1892] 1 Q. B. 648.
(13) 20 Q. B. D. 430.

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shall be paid by the appellant or by the county fund; in any event the justices will not suffer. Full protection is given to them by s. 66. Sect. 4 of the Summary Jurisdiction Act, 1884, struck out from s. 31 of the Summary Jurisdiction Act, 1879, the words "by this or any future Act," and so made it apply to s. 29 of 9 Geo. 4, c. 61. A discretion as to costs is by s. 31 of the Act of 1879 given to the Appellate Court, and therefore all prior enactments which gave no discretion were necessarily repealed: *Garnett* v. *Bradley* (1); *London County Council* v. *Churchwardens of West Ham.* (2) The legislature intended that the Summary Jurisdiction Acts should form one complete code of procedure. Sect. 10 of the Act of 1884 excepts one class of cases, and it would be a strong thing to introduce other exceptions: *Reg.* v. *Justices of Glamorganshire.* (3) The Act applies only to procedure. As to the power to state a case under s. 33 of the Summary Jurisdiction Act, 1879, see *Reg.* v. *Lord Mayor of London* (4); *Reg.* v. *Justices for Glamorganshire* (5); *Fourth City Mutual Building Society* v. *Churchwardens of West Ham* (6); *Deputies of the Freemen of Leicester* v. *Hewitt.* (7)

To shew that the justices are not "parties" to the appeal, *Rex* v. *Justices of Hants* (8) was cited; but in that case the words of the statute were "the parties appealed against." In *Reg.* v. *Davidson* (9) the words were the same. In *Reg.* v. *Goodall* (10), the Act provided that notice was to be given by the appellant to the other party and to the court of summary jurisdiction, and that the Court of Appeal might make such order as to costs to be paid by either party as the Court should think just; and the Court of Queen's Bench, on the authority of *Reg.* v. *Justices of Hants* (8), held that quarter sessions could not award costs against convicting justices. In the same way s. 31 of the Act of 1879 speaks of "costs to be paid by either party."

A mandamus will not be granted where there is another remedy: *Rex* v. *Inhabitants of Frieston.* (11) Here a case might

(1) 3 App. Cas. 944.
(2) [1892] 2 Q. B. 173.
(3) 22 Q. B. D. 628.
(4) 57 L. T. (N.S.) 491.
(5) [1892] 1 Q. B. 621, 628.
(6) [1892] 1 Q. B. 661.
(7) 62 L. J. (M.C.) 51.
(8) 1 B. & Ad. 654.
(9) 24 L. T. (N.S.) 22.
(10) Law Rep. 9 Q. B. 557.
(11) 5 B. & Ad. 597.

have been stated by quarter sessions. The Court has a discretion as to granting a mandamus: *Reg.* v. *All Saints, Wigan.* (1)

Reg. v. *Mainwaring* (2) is a strong authority that a mandamus will not lie because an inferior court has wrongly interpreted a statute.

The justices had jurisdiction to decide whether s. 29 of the Act of Geo. 4 had been repealed. Their functions under s. 29 are not purely ministerial; they have to decide what sum for costs will be an indemnity to the licensing justices. Their decision was inter partes, and was a judicial act.

Marshall Hall, for Magerkorth, was allowed to address the Court as *amicus curiæ*. The licensing justices are "parties" to the appeal: *Price* v. *James.* (3) So far as it affects the present case, s. 29 of 9 Geo. 4, c. 61, is repealed in toto by the Act of 1872. The schedule to that Act continues s. 29 only so far as it relates to the renewal or the transfer of licences under ss. 4 and 14 of the same Act. The application by Magerkorth was not made under either of those sections; it was really made under s. 42 of the Licensing Act, 1872. Even if s. 29 has not been expressly repealed, it must be read in conjunction with s. 27. The object of s. 29 was to protect justices against vexatious and frivolous appeals. It adds to the powers conferred by s. 27, but it does not take away the discretion of quarter sessions as to costs. Notwithstanding the use of the word "required," s. 29 is not compulsory, but is only enabling.

Jelf, Q.C., in reply. As to the merits, the point raised is an important and difficult one. Sect. 29 of the Act of Geo. 4 is, no doubt, supplemental to s. 27. Sect. 27 deals with the real parties to the appeal, and s. 29 with persons who may be called outsiders. There is no foundation for the argument that the word "required" in s. 29 is not peremptory. The justices are not in any proper sense "parties" to the appeal. The legislature thought it right that they should have notice of the appeal, and if they choose to appear they are, even if they have decided wrongly, to have such a sum by way of indemnity against their costs as the quarter sessions shall think sufficient. In *Reg.* v. *Purdey* (4) it was held

(1) 1 App. Cas. 611.
(2) E. B. & E. 474.
(3) [1892] 2 Q. B. 428.
(4) 5 B. & S. 909.

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that the court of quarter sessions could not under 12 & 13 Vict. c. 45, s. 5, when a conviction was quashed, award costs against the convicting justices, because those justices, though served with notice of the appeal, were not really "parties" to it. Sect. 29 has not been repealed by the subsequent legislation. It is a separate and independent provision for the costs of the justices—not a matter of procedure on the appeal. The only case which creates any difficulty is *Reg.* v. *Justices of Glamorganshire.* (1) That the justices are not "parties" to an appeal, though they may be called so colloquially, is shewn by *Reg.* v. *Justices of Gloucestershire.* (2)

[LINDLEY L.J. In *Reg.* v. *Justices of Cheshire* (3) Coleridge J. asked, at p. 141, "Might not the justices have been subjected to costs?"]

If there is any ambiguity in the Summary Jurisdiction Acts, the Court will not hold that s. 29 has been repealed.

With regard to s. 66 of the Local Government Act, 1888, it does not get rid of the difficulty of interpretation, because the interval from 1884 to 1888 was not covered by it. But, in truth, s. 66 does not apply to the present case, because this is not a proceeding against the justices. Moreover, the costs are "otherwise provided for" by s. 29.

Danckwerts, in reply, as to the new cases cited in reply. *Reg.* v. *Justices of Gloucestershire* (2) was a decision upon the earlier part of s. 31 of the Summary Jurisdiction Act, 1879; the word "party" in sub-s. 5 of s. 31 must mean "party to the appeal." In *Reg.* v. *Purdey* (4) the justices did not appear, and could not be said to be "parties." In *Reg.* v. *Huntley* (5), *Reg.* v. *Hellier* (6) was considered.

Cur. adv. vult.

Jan. 26. LINDLEY L.J. This is an appeal by the justices of the peace for the Tower Division of London against an order of a Divisional Court discharging, with costs, a rule for a mandamus to the London Quarter Sessions. In substance, although not in

(1) 22 Q. B. D. 628.
(2) 41 W. R. 379.
(3) 11 A. & E. 139.
(4) 5 B. & S. 909.
(5) 23 L. J. (M.C.) 106.
(6) 17 Q. B. 229.

form, the mandamus was to compel the London Quarter Sessions to order a person named Magerkorth to pay the appellants certain costs incurred by them upon an appeal from a refusal to renew his licence.

The appellant justices contend that under the Act 9 Geo. 4, c. 61, s. 29, they are entitled, as a matter of right, to an order indemnifying them against the costs in question. The court of quarter sessions, while affirming the order of the licensing justices, refused to give them any costs of the appeal against their order. They did so, as we were informed, on the ground that they had a discretion in the matter of costs under s. 31 of the Summary Jurisdiction Act, 1879. The Divisional Court refused a mandamus, upon the ground that the question was one for the quarter sessions to decide, and that, even if the court of quarter sessions were wrong in the view which they took of the Act of 1879, no mandamus ought to go. It was strongly contended before us that the court of quarter sessions had no jurisdiction to refuse the licensing justices their costs, and that a mandamus ought to go to compel the court of quarter sessions to order those costs to be paid. The extent of the jurisdiction of an inferior court must necessarily be ascertained before the question whether they have exceeded it or have refused to exercise it can be determined; and a mistake made by an inferior court upon the extent of its own jurisdiction can be corrected by mandamus, prohibition, or certiorari, according to the circumstances of the case. See as to mandamus, *Brooke* v. *Ewers* (1); *Reg.* v. *Justices of Monmouthshire* (2); *Reg.* v. *King.* (3) Unless this were so there would be no method of controlling inferior courts. But from time immemorial the Court of Queen's Bench has had the power of compelling such Courts to exercise their jurisdiction, and of preventing them from exceeding it. On the other hand, it is equally clear that there is no appeal from the decision of an inferior court upon any matter which that Court is competent to decide, unless a right of appeal is conferred by statute.

Before, therefore, determining whether a mandamus ought to

(1) Str. 113. (2) 1 D. & L. 145.
(3) 20 Q. B. D. 430.

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go or to be refused, it is necessary to ascertain what jurisdiction the court of quarter sessions has over costs in cases like the present. This inquiry involves the necessity of examining several Acts of Parliament in order to determine whether s. 29 of 9 Geo. 4, c. 61, is still in force, and, if it is, whether it is applicable to this particular case.

Sects. 27, 28, and 29 of 9 Geo. 4, c. 61, relate to appeals from orders made by justices of the peace. A right of appeal to quarter sessions is given by s. 27. Sect. 28 authorizes justices to bind persons to appear and give evidence on the appeal. Sect. 29 provides, inter alia, for the payment by an unsuccessful appellant of the costs and charges of the justices whose order is appealed against, and who under s. 27 have to be served with notice of the appeal. The costs and charges to which justices are entitled under this section are strictly limited to those which they have incurred by reason of their having been served with notice of the appeal. In 1872 these sections were expressly repealed, except so far as they relate to renewals of licences and transfers of licences under ss. 4 and 14 of 9 Geo. 4, c. 61. (See 35 & 36 Vict. c. 94, s. 75, and Sched. II.) The language of this repealing Act would lead any one to suppose that ss. 27, 28, and 29 of 9 Geo. 4, c. 61, were wholly unrepealed in 1872. But this appears not to be the case, for it was decided in 1851 by *Reg.* v. *Hellier* (1) that part of s. 29 of 9 Geo. 4, c. 61, had been repealed in 1848 by the Summary Jurisdiction Act (11 & 12 Vict. c. 43), s. 27. *Reg.* v. *Hellier* (1) was an appeal from a conviction, and not an appeal from an order relating to a renewal or transfer of a licence. But *Reg.* v. *Hellier* (1) is important as shewing that the provisions of 9 Geo. 4, c. 61, relating to notices to justices and to costs to be paid to them by an appellant, were very materially altered, and in some very important respects repealed, by the Summary Jurisdiction Act, 1848. It is, however, in my opinion, plain that in 1872 the legislature intended to preserve and did preserve ss. 27, 28, and 29 of 9 Geo. 4, c. 61, so far as they were then in force, and so far as they related to the renewal of licences or the transfer of licences under ss. 4 and 14 of the same Act. If this conclusion be correct, it follows that, notwithstanding the repeal

(1) 17 Q. B. 229.

of ss. 27, 28, and 29 of 9 Geo. 4, c. 61, as regards all matters except renewals or transfers of licences, still upon an appeal to quarter sessions from an order made on an application to renew a licence, a justice served with notice of the appeal continued to be entitled under s. 29 of the Act of 9 Geo. 4, c. 61, to an order that the unsuccessful appellant should pay him such sum by way of costs as should, in the opinion of the court of quarter sessions, be sufficient to indemnify him "from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal." Such I take to have been the law as it stood after the passing of the Act of 1872. Since that Act there has been no further express repeal of the ss. 27, 28, and 29 of 9 Geo. 4, c. 61. But there have been several Acts consolidating and amending the various statutes relating to proceedings before magistrates, and one question is, whether these later statutes are so inconsistent with ss. 27, 28, and 29 of 9 Geo. 4, c. 61, as to have impliedly repealed them even in licensing cases.

The subsequent statutes to which I refer are the Summary Jurisdiction Acts of 1879 and 1884. These Acts, with the previous Summary Jurisdiction Acts of 1848 and 1849, form a code of procedure which it is necessary to study with care.

In interpreting these Acts it must be borne in mind that justices in dealing with licensing matters are a court of summary jurisdiction within the meaning of these Acts. This was decided in *Reg.* v. *Justices of Glamorganshire* (1) to be the true construction of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 7, and of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13, clause 11. But the Act 9 Geo. 4, c. 61, is not one of the "Summary Jurisdiction Acts" (see 42 & 43 Vict. c. 49, s. 50, and 52 & 53 Vict. c. 63, s. 13, clause 7), and this circumstance creates some difficulty in applying those Acts to licensing cases.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), is divided into parts. Part 2 is headed "Amendment of Procedure," and ss. 31 and 32 relate to appeals. These sections do not give a right to appeal, but are applicable respectively to

(1) [1892] 1 Q. B. 621.

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cases in which a right to appeal is given either by the Act itself or any future Act (s. 31) or by some prior Act (s. 32). This last section, which is the one applicable to appeals under the 9 Geo. 4, c. 61, was not obligatory, and there is nothing in the Act of 1879 which repeals ss. 27, 28, and 29 of 9 Geo. 4, c. 61, so far as they were then in force. That Act is not referred to in the schedule of statutes repealed by s. 55 of the Act of 1879, nor, having regard to s. 32, can it, I think, be said that the above sections of 9 Geo. 4, c. 61, are inconsistent with the Act of 1879. The Summary Jurisdiction Act of 1879 was, however, materially amended by the Summary Jurisdiction Act, 1884. The preamble of this Act, 47 & 48 Vict. c. 43, is important, and runs thus: "Whereas the Summary Jurisdiction Acts regulate the procedure before courts of summary jurisdiction, and on appeals from those courts to courts of quarter sessions, and it is expedient to provide for uniformity of procedure in all such cases." The Act then, by s. 4 and the schedule, repeals a great number of enactments, not, however, including the 9 Geo. 4, c. 61, ss. 27 to 29. But ss. 31 and 32 of the Summary Jurisdiction Act, 1879, are very materially altered. The first part of s. 32 is repealed down to the words, "In accordance with the conditions and regulations contained in this Act." Sect. 31 is expressly amended by striking out the words "by this Act or any future Act." The effect, then, of the Act of 1884 on the Act of 1879 is to make s. 31 of that Act apply to all appeals to quarter sessions from courts of summary jurisdiction. But, if so, s. 31 is inconsistent with so much of s. 29 of 9 Geo. 4, c. 61, as entitles the licensing justices to costs, if they can be regarded as "a party" within clause 5 of s. 31. Moreover, if this inconsistency is established, then by s. 55 of the Act of 1879, s. 29 of 9 Geo. 4, c. 61, is repealed so far as the inconsistency extends.

The question for determination thus becomes narrowed down to the question, whether the licensing justices can be regarded as a "party" within clause 5 of s. 31 of the Act of 1879 as amended by the Act of 1884. I certainly am not prepared to hold that they cannot be so regarded. Whether they can or cannot seems to me to depend on the circumstances of each case. If there is an objector who is the real party, and the licensing justices,

though served with notice of the appeal, either do not appear, or, even if they do, yet take no part in the appeal beyond informing the Court of Appeal of the reasons for which they acted, then, in my opinion, the justices are not parties. This conclusion is warranted by comparing the language of clause 2 of s. 31 with clause 5 of the same section, and is in conformity with *Rex* v. *Justices of Hants* (1); *Reg.* v. *Purdey* (2); *Reg.* v. *Goodall.* (3) If there is no objector, and the licensing justices take no active part in the appeal, or merely inform the Court of the reasons for their own order, then again, in my opinion, they are not parties to the appeal. But, whether there is an objector or not, if the licensing justices not merely inform the court of quarter sessions of the reasons for which they acted, but act as objectors themselves and actively oppose the appeal, then, in my opinion, they make themselves parties, and may even be made to pay costs. In the case supposed it is by no means clear that they could not have been made to pay costs under s. 27 of 9 Geo. 4, c. 61 (see *Reg.* v. *Justices of Cheshire.* (4)) Such costs are not the costs contemplated in the first part of s. 29 of that Act, but are costs of an entirely different character.

In this particular case there were no respondents to the appeal to quarter sessions except the licensing justices. The order of quarter sessions describes them as parties; they appeared by counsel to support their own order; and, if I understand rightly, they actively opposed the appellant. In short, they acted as his opponents, and made themselves parties to the appeal. They have not applied, and they could not successfully apply, for a mandamus on the ground that the court of quarter sessions took an erroneous view of their conduct. The appellants rest their case on the broad ground that, whatever their conduct was, the court of quarter sessions had no jurisdiction to deprive them of their costs. I cannot adopt this view, and I have come to the conclusion that the decision appealed from was correct. As already observed, the costs to which justices would be entitled under the first part of s. 29 of 9 Geo. 4, c. 61, are strictly confined to costs and charges incurred by them by

(1) 1 B. & Ad. 654.
(2) 5 B. & S. 909.
(3) Law Rep. 9 Q. B. 557.
(4) 11 A. & E. 139, 141.

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reason of the notice served upon them. Any costs beyond those are not within the section. If, as appears to be the case, there is no statute except 9 Geo. 4, c. 61, which entitles justices (who do not make themselves parties) to be indemnified against such costs and charges as they are entitled to under s. 29 of that Act, it will follow that s. 29 is still applicable to such a case, and that the court of quarter sessions will have no jurisdiction to deprive them of their costs. Moreover, if in the case supposed the court of quarter sessions were to refuse them their costs, upon the ground that s. 29 of 9 Geo. 4, c. 61, was repealed, I should be of opinion that a mandamus ought to go to compel the quarter sessions to exercise their jurisdiction in the only way in which they could exercise it—namely, by making an order for the payment by the appellant of such costs. But the present case is not one of that description. *Garnett* v. *Bradley* (1) is, in my judgment, an authority for, and not against, the conclusion at which I have arrived. It leaves justices, who do no more than s. 29 of 9 Geo. 4, c. 61, contemplated, entitled to the indemnity which that section has provided for them; but justices who make themselves parties are not entitled to that indemnity.

A. L. SMITH L.J. This is an appeal from a judgment of the Queen's Bench Division, refusing to make absolute a rule nisi for a mandamus, commanding the justices in and for the administrative county of London in quarter sessions assembled to enter continuances, and to hear and determine according to law an appeal in which John Magerkorth was appellant, and the licensing justices acting in and for the Tower Division of the county were respondents, the object sought by the mandamus being, that the licensing justices, who were respondents to the appeal, might obtain from the justices of the county of London an order for costs, under s. 29 of 9 Geo. 4, c. 61, which the justices of London had refused to make.

This rule nisi was resisted upon the ground that as to this matter of costs they, the justices of London, had heard and correctly determined it according to law, and that, if not, it was

(1) 3 App. Cas. 950.

a matter within their jurisdiction to hear and determine, and that upon either ground the rule must be discharged.

My brothers Pollock and Grantham were of opinion that this latter ground was sufficient for discharging the rule; but, considering the course the forcible and learned arguments have taken in this Court, it is necessary to determine the main point first, in order to ascertain what is the position of licensing justices as to costs in such a case as the present.

That the licensing justices were in fact respondents to the appeal in the present case cannot be denied. The order of sessions of July 2, 1894, describes them as parties to the appeal, and in one of their affidavits they designate themselves as "respondent justices," and they instructed counsel on their behalf to contest, and he did contest, the appeal with the appellant.

The important point raised by the case is, whether, when an appeal is brought at quarter sessions, under s. 27 of the Alehouse Act, 1828, against the refusal of justices at the general annual licensing meeting to grant a renewal of a licence, and the appeal is dismissed, the justices in quarter sessions are bound, under s. 29 of that Act, to order that the appellant shall pay to the justices, who appear as litigant parties and contest the appeal, their costs so as to indemnify them therefrom.

It is necessary, in the first place, accurately to determine what ss. 27 and 29 of the Act of 9 Geo. 4, c. 61, enact, for, until this is done, it is impossible to understand what is the position of licensing justices as to costs, either under that Act or the subsequent Summary Jurisdiction Acts, when their decision is appealed against.

By s. 27 of 9 Geo. 4, c. 61, an appeal is given to a party aggrieved by any act of any justice done in or concerning the execution of that Act, and in the present case Magerkorth, the landlord, being a party aggrieved by reason of his tenant having been refused a renewal of his licence by the justices, appealed to quarter sessions.

It will be seen that s. 29 does not provide who is to be respondent to such an appeal, and indeed, in cases in which there is no one appearing before the licensing justices to object to the renewal of a licence, there is no one who can be compelled to be

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a respondent. If there be an objector, he would ordinarily be the respondent.

The licensing justices cannot be made respondents and parties to the appeal against their will. All that the appellant has to do as regards them is to give them notice of his intention to appeal.

Upon this notice being given the licensing justices have three courses open to them. They need not go to quarter sessions at all. They may go there in their character of justices, as distinguished from that of litigant parties to the appeal. They may also go there as respondents, i.e., litigant parties, to the appeal, if the appellant treats them as such and they accept that position.

Although there is no machinery by which justices can be made respondents against their will, I know of no impediment to their becoming in fact respondents, if the appellants seek to make them parties, and they acquiesce in being so treated. If they become parties to the appeal, in my judgment, the provision in s. 27 as to costs applies to them as to any other respondent; and the court of quarter sessions may determine the appeal "with or without costs, as to the Court shall seem meet."

By s. 29 the licensing justices are dealt with, not as *parties* to the appeal, but as justices, who, having notice of the appellant's intention to appeal, may, if they think fit, go to quarter sessions, not as litigant parties, but as justices whose decision is appealed against, and inform the court of quarter sessions of the reasons for their decision.

The costs which by sect. 29 the court of quarter sessions are required to award to such justices, whether the appeal be dismissed or allowed, are such as shall, in the opinion of the Court, be sufficient to indemnify such justices from "all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of the appellant to appeal."

The costs *inter partes*, as before stated, are dealt with in s. 27. These are not the "indemnity costs," as Mr. Jelf calls them, which are dealt with in s. 29. As to these latter costs s. 29 is imperative that the court of quarter sessions, if the appeal is

dismissed, shall order that they shall be paid by the appellant to the justices, i.e., upon their appearing as justices, and, if default in payment of such costs be made, the appellant may be committed to gaol until he pays them, and, if the appeal be allowed, the justices in quarter sessions may order that the licensing justices are to obtain like costs from the treasurer of the county.

That justices who receive the above-mentioned notice are not thereby rendered parties to the appeal is, upon examining the section, clear. Moreover, if they were parties there would be found presumably some provision by which the appellant could get his costs from the justices if he succeeded, and yet in s. 29 there is none.

The authorities also shew that justices who merely have notice of the appellant's intention to appeal served upon them are not thereby made parties to the appeal: *Reg.* v. *Purdey* (1), *Reg.* v. *Goodall* (2), and *Price* v. *James.* (3)

Unless the licensing justices accept the position of respondents contesting the appeal with the appellant, they are not parties to the appeal, but if they do, in my judgment, they become parties thereto, and accept the responsibilities attaching thereto.

It was argued on behalf of the justices of London that s. 29 of the Act of George IV. has been repealed by implication, first by s. 27 of Jervis' Act (11 & 12 Vict. c. 43), and, if not by that, then by the subsequent Summary Jurisdiction Acts, by s. 31 of the Act of 1879 read in conjunction with the Summary Jurisdiction Act, 1884, ss. 6, 7, and, if necessary, with the Interpretation Act, 1889, s. 13, sub-s. 11.

That these Summary Jurisdiction Acts form the code by which the procedure of justices in petty sessions and upon appeal to quarter sessions is now regulated I do not doubt, and the preamble to the Act of 1884 shews that this is so, and in *Reg.* v. *Shingler* (4) and *Reg.* v. *Justices of Glamorganshire* (5) it was so held, and that this code also applies to appeals to quarter

(1) 5 B. & S. 909.
(2) Law Rep. 9 Q. B. 557.
(3) [1892] 2 Q. B. 428.
(4) 17 Q. B. D. 49.
(5) 22 Q. B. D. 628.

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sessions from decisions of licensing justices was held in *Reg.* v. *Justices of Glamorganshire and Pontypool.* (1)

In *Reg.* v. *Hellier* (in 1851) (2) it was held that s. 27 of 11 & 12 Vict. c. 43 was inconsistent with some parts of s. 29 of the Act of George IV., namely, the direction as to payment of the costs awarded to the clerk of the peace instead of to the justice, and the provision for imprisoning the appellant until he paid such costs; but that case, although the Court refused to enforce a fi. fa. founded upon an order drawn up in the terms of s. 29 of 9 Geo. 4, c. 61, did not decide that that section was repealed in toto, as was at one time suggested by Mr. Poland, and indeed this was but faintly insisted upon at the bar.

The second schedule of the Licensing Act, 1872, shews that at that date s. 29 of 9 Geo. 4, c. 61, was not wholly repealed, for by that Act certain portions of that section were repealed, leaving untouched the other parts which relate to the matters in hand—a clear indication that the legislature did not then consider that section already repealed.

I do not doubt that, since the passing of the Summary Jurisdiction Act, 1884, appeals from licensing justices to quarter sessions as regards costs inter partes are regulated by sub-s. 5 of s. 31 of the Summary Jurisdiction Act, 1879, and consequently an appellant must now appeal subject to the condition that the court of quarter sessions may make such order as to costs to be paid by *either party* as the Court may think just.

The word "party" in sub-s. 5 of s. 31 means precisely the same as the word "party" in sub-s. 3 of that section, i.e., a litigant party to the appeal, and s. 31 does not touch the provisions of s. 29 of the Act of George IV., which have solely reference to the peculiar position of justices who appear at quarter sessions, not as litigant parties to the appeal, but as justices who are not parties thereto.

These being the provisions of this code, I have arrived at the conclusion that s. 31 of the Act of 1879, as now to be read in conjunction with the Act of 1884, does not repeal s. 29 of the Act of 9 Geo. 4, c. 61, and that, excepting in so far as *Reg.* v.

(1) [1892] 1 Q. B. 621. (2) 17 Q. B. 229.

Hellier (1) decided that s. 27 of 11 & 12 Vict. c. 43 is inconsistent with it and the Licensing Act of 1872 has interfered with it, s. 29 still stands unrepealed.

But, though this is so, what was the jurisdiction to be exercised by the justices of London as to costs in the present case?

When they decided to dismiss the appeal they had two litigant parties before them: the appellant on the one hand, and the respondent justices on the other. Then what was to be done? In my judgment, to exercise the discretion vested in them, either under s. 27 of 9 Geo. 4, c. 61, or under s. 31 of the Act of 1879, as to whether they would award costs to the parties who were respondents; and when the justices of London decided that they had such a discretion in the present case they decided rightly and according to law.

A series of cases were cited to us upon the one side and the other as to when a mandamus had been granted or refused.

The importance of these cases, is to ascertain upon what principle it is that the Court has heretofore acted in granting or refusing a mandamus. It is of no avail to discuss whether each case, upon its facts, was within or without the rule applicable to the granting or refusing a mandamus. The rule is this. When an inferior court hears and determines a matter within its jurisdiction, however erroneously it may decide, either the law or the facts therein, no mandamus will go, the reason being that the Court of Queen's Bench has no prerogative to decide by way of appeal matters decided by an inferior court within its jurisdiction.

But when an inferior court has declined jurisdiction the Court of Queen's Bench has a prerogative by way of mandamus to command the inferior court to proceed to do its duty according to law, and when an inferior court has usurped jurisdiction, that is, has exceeded its jurisdiction, certiorari or prohibition is the appropriate remedy. The judgment of Lord Esher in *Reg.* v. *King* (2) lays down in other words this rule as to mandamus.

It appears to me that, if the sole jurisdiction given to an inferior court by an Act of Parliament be, that, upon the happening of a given event, the inferior court shall award costs

(1) 17 Q. B. 229. (2) 20 Q. B. D. 430.

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to certain designated persons, to be paid by another designated person, and the event in fact happens, and there is no dispute as to who the designated persons are, and the inferior court nevertheless refuses to obey the Act, and to award costs as enacted, it declines jurisdiction within the meaning of the rule, and that the inferior court, in order to give itself jurisdiction, can no more decide that the Act has been repealed than it can decide any other fact to exist which does not exist, so as to give itself jurisdiction. But that is not the present case, when rightly understood. Upon the assumption that the justices of London were in error in the conclusion at which they arrived (though I think they were not, whatever their reasons may have been), when the respondent justices were applying for costs under s. 29 of 9 Geo. 4, c. 61, it was for the justices of London to determine whether, under the circumstances which then existed, the respondent justices were persons entitled to costs under s. 29, or were persons entitled to costs as being litigant parties to the appeal, and to whom s. 29 did not apply, and that this was a matter clearly within their jurisdiction to decide, and, consequently, whichever ground be taken, each is fatal to the rule nisi.

For these reasons, in my judgment, the appeal of the licensing justices fails, and it must be dismissed with costs. Whether these justices can obtain the costs they have been put to under s. 66 of the Local Government Act, 1888, I give no opinion, for that section does not, in my judgment, affect the decision of the present case.

Appeal dismissed.

Solicitors: *E. W. Beal; Nicholson & Patterson; King & Burrell.*

W. L. C.

NORRIS *v.* BIRCH.

1895
Jan. 15.

Metropolis—Public Carriage Acts—Driver's Licence—Defacement by Proprietor —"Matter of Complaint"—Evidence of Damage—Hackney Carriage Act, 1843 (6 & 7 *Vict. c.* 86), *ss.* 8, 22.

By s. 8 of the Hackney Carriage Act, 1843 (6 & 7 Vict. c. 86), licences are to be granted to the driver of every hackney carriage, and every proprietor of a hackney carriage employing the driver named in the licence is to enter upon the licence the days on which the driver entered and quitted his service respectively.

The foreman of a cab proprietor, in making the entries required by the above section, inserted in the licence one date of entering the proprietor's service and two dates of quitting it, and signed his name at the end of the entry. The effect of these entries was found to be to prejudice the driver with other cab proprietors, to the knowledge of the foreman who made the entries. At the hearing of a summons against the proprietor for defacing the licence, the driver called two cab proprietors who said that they should refuse to employ a driver producing a licence so marked; but no evidence was given that he had actually asked for employment and been refused it:—

Held, that the entries were not made in compliance with 6 & 7 Vict. c. 86, s. 8, but amounted to a defacement of the licence; that such defacement was a "matter of complaint" within the meaning of s. 22 of that Act, over which a metropolitan police magistrate had jurisdiction, and that there was evidence of loss or damage upon which the magistrate could award compensation to the driver.

Case stated by a metropolitan police magistrate.

The respondent, a cab proprietor, had been summoned by the appellant, a licensed cab driver, to answer a complaint that he, being the proprietor of a certain hackney carriage, and employing the appellant as driver of the said carriage, had unlawfully defaced his licence. Upon the hearing of the summons the appellant gave evidence that he entered the respondent's service on March 16, 1894, and left it on May 2, 1894, and that he applied to the respondent on July 26, 1894, for his licence to be returned to him. He admitted that there were some breaks in the said service, and the magistrate found as a fact that the statements made upon the licence, and hereinafter referred to, were as a fact true. When the appellant's licence was, on his application, returned to him, it was marked as follows:—

"Entries as required by the Act 6 & 7 Vict. c. 86, s. 8, and

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by 32 & 33 Vict. c. 115, and the orders made in pursuance thereof, incorporating the said requirements, are to be made by proprietors in the respective columns beneath.

Name of Proprietor.	Address of Proprietor.	Date when within-licensed Person entered Proprietor's Service.	Date of quitting Service.
J. M. Birch.	27, Great Peter Street, Westminster.	March 16, 1894.	March 23, 1894. May 2, 1894. Louis Johnson."

The two first rows of the marking were printed on the licence, as they are on all cab drivers' licences; the third and fourth were filled up in writing. Louis Johnson was a foreman of the respondent.

The appellant complained that the writing in the last column was a "chair-marking" of his licence and would prejudice his chance of obtaining employment from other cab proprietors. He did not allege that he had as a fact produced the said licence to any other cab proprietor asking for employment and had been refused. He called two cab proprietors who gave evidence that they should refuse employment to any driver producing a licence so marked. They said that only one date ought to appear there, and that anything appearing in the last column except the date is in the cab trade "supposed to be against a man's character."

The respondent called no witnesses, and the magistrate found as a fact that the writing in the last column, though in every respect true, was so written as to prejudice the appellant with other cab proprietors to the knowledge of Louis Johnson, the respondent's agent.

It was not seriously contended for the appellant that the above facts disclosed any offence against the Hackney Carriage Acts for which the respondent was liable to any penalty, but it was contended that they disclosed a matter of complaint between the respondent and appellant within 6 & 7 Vict. c. 86, s. 22, and

the learned magistrate was asked to deal with it under that section.

The learned magistrate was of opinion (1.) that the facts did not disclose such a matter of complaint as was within 6 & 7 Vict. c. 86, s. 22, and (2.) that the appellant gave no evidence of any damage or loss upon which upon any basis compensation could be assessed; and he dismissed the summons.

The question for the opinion of the Court was whether he was right in either of these opinions. (1)

Morton Smith, for the appellant. The respondent has not complied with the statutory directions as to the indorsement to be made by him upon the appellant's licence. Those directions must be complied with strictly, and the addition of anything to that which is authorized, such as the indorsement of the reasons for discharging a driver, gives rise to a cause of action for defacing the licence: *Hurrell* v. *Ellis* (2); *Rogers* v. *Macnamara*. (3) In the present case, if there was only one employment, two dates

(1) By 6 & 7 Vict. c. 86, s. 8, provision is made for the granting of licences by the registrar of metropolitan public carriages to drivers of hackney carriages, and on every licence "the registrar shall cause proper columns to be prepared, in which every proprietor employing the driver named in such licence shall enter his own name and address and the days on which such driver shall enter and shall quit his service respectively . . . ."

[Under 13 & 14 Vict. c. 7, s. 2, the duties of the registrar are performed by the commissioners of police.]

By s. 21 the proprietor is to retain the licence in his possession while the driver remains in his service.

By s. 22, "it shall be lawful for any justice of the peace to hear and determine all matters of complaint between any proprietor of a hackney carriage or metropolitan stage carriage and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss which shall have arisen through the neglect or default of any driver or conductor to the property of his employer entrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of the peace to pay, and which has been actually paid pursuant to such order, on account of the negligence or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper."

(2) 2 C. B. 295; 15 L. J. (C.P.) 18.

(3) 14 C. B. 27; 23 L. J. (C.P.) 1.

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of quitting the service should not have been inserted, while if there were two separate employments, the date of the second employment should appear. The effect of the entries as made is to shew other cab proprietors that the appellant had taken part in a cab strike, and the entries are found by the magistrate to be a "chair-marking" of the licence, and to be so written as to prejudice the appellant with other cab proprietors. The signature of the foreman is also unauthorized by the statute, and amounts to a "chair-marking"; it is wholly unnecessary, as the master's name appears in the first column. Secondly, this was a "matter of complaint" between the proprietor and driver of a hackney carriage within the meaning of s. 22 of the Hackney Carriage Act, 1843. The language of that section is perfectly general, and gives the magistrate jurisdiction to order compensation "in respect of any other matter of complaint between them"; it applies to every matter of complaint arising out of the employment. The class of complaints intended to be covered by the section is well illustrated by the cases of *Clemson* v. *Hubbard* (1) and *Hindley* v. *Haslam* (2), under the Employers and Workmen Act, 1875. Thirdly, there was evidence of damage upon which it was competent to the magistrate to find that the appellant was entitled to compensation; it was unnecessary under the circumstances to shew that he had actually asked for, and been refused, employment.

W. B. Campbell, for the respondent. As regards the indorsement on the licence, there has been a substantial compliance with the requirements of the Act. In the cases of *Hurrell* v. *Ellis* (3) and *Rogers* v. *Macnamara* (4) something had been indorsed on the licence which was obviously wholly foreign in its nature to the particulars contemplated by the statute; in the present case there has been merely an omission of the date of the re-commencement of the employment, and an omission is not a defacing of the licence. The addition of the foreman's signature, if unnecessary, is not a defacing of the licence. This was not a "matter of complaint" within the meaning of s. 22; some limitation must be placed on the general words at the end

(1) 1 Ex. D. 179.
(2) 3 Q. B. D. 481.
(3) 2 C. B. 295; 15 L. J. (C.P.) 18.
(4) 14 C. B. 27; 23 L. J. (C.P.) 1.

of that section, and regard must be had to the special cases of complaint dealt with in the previous part. There was no evidence which afforded a basis on which compensation could be assessed.

LAWRANCE J. I am of opinion that the magistrate was wrong, and that the respondent has not complied with the provisions of the statute by making the entries which he has made in the third and fourth columns. By s. 8 of the Act of 1843, the proprietor is to enter on the licence the days on which the driver enters and quits his service, and if in the present case nothing but the last days of entering and quitting the service respectively had been inserted the terms of the section would have been complied with. What has been done, however, is to insert one date of entry and two dates of quitting, and it is obvious that this cannot be the whole truth; and there is also the addition of the foreman's signature, which is not required by the Act. The learned magistrate has found that the entries were so written as to prejudice the appellant to the knowledge of the foreman who wrote them, and his decision seems to be inconsistent with his conclusion on the facts. I have come clearly to the conclusion that what was done was not a compliance with s. 8, but was a defacing of the licence within the meaning of that section. As to what is a defacing of a licence, the cases of *Rogers* v. *Macnamara* (1) and *Hurrell* v. *Ellis* (2) have been cited to us, and I cannot doubt that the present case falls within the principle of those decisions.

Then it is said that this was not a matter of complaint between the proprietor and the driver within the meaning of s. 22, and that the magistrate had no jurisdiction under that section. It has been contended that that section points out the particular disputes which the magistrate is entitled to hear, because it gives him power to "order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, &c." I do not agree with that contention, and think that the section must be read as embracing any

(1) 14 C. B. 27; 23 L. J. (C.P.) 1. (2) 2 C. B. 295; 15 L. J. (C.P.) 18.

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matter of complaint in reference to the employment: that seems to me to be clear from the last clause, which empowers the magistrate to order compensation to either party "in respect of any other matter of complaint between them"; that language must include anything not dealt with by the earlier part of the section. The present seems to be one of the very cases that the legislature would contemplate as being likely to arise, and I have no doubt that the learned magistrate had jurisdiction.

It is also said that there was no evidence before the magistrate upon which he could give compensation. I do not think that that was the case. Two cab proprietors were called for the respondent, who said in effect that if they had read the indorsement on his licence they would not have employed him, and that it was known that such an indorsement would prejudice him with any one who was going to employ him. I am clearly of opinion that that was evidence on which the learned magistrate ought to have acted.

KENNEDY J. I am of the same opinion. The statutory directions in s. 8 as to the entries to be made by the proprietor have been considered in previous cases, and in *Rogers* v. *Macnamara* (1) Jervis C.J. clearly laid it down that the proprietor could indorse upon the licence nothing but that which the statute directed him to indorse, and that any matter of complaint against a driver could only be indorsed by a police magistrate under s. 21 of the Act. In the present case the magistrate has found as a fact that the writing in the fourth column was so written as to prejudice the appellant with other cab proprietors, and on looking at that column we find the entry to consist of two dates of the appellant's quitting the respondent's service, and the signature of the foreman. The signature is not required by the statute to be put in that column at all; therefore, on the facts, we have to deal with a case in something which is not required is inserted, and inserted in a position in which to the proprietor's knowledge it meant something against the man. If that is so, it is clearly a case in which on reason, as well as on authority, there has been a

(1) 14 C. B. 27; 23 L. J. (C.P.) 1.

defacing of the licence. We have not to deal with a case where the entry, if correctly stated, requires the insertion of two dates, and one of them is omitted; I am not prepared to say that, if that were the case, and people chose to treat such a state of things as a bad mark, there would have been a defacing of the licence. But here there is not only an omission in the third column, and an insertion in the fourth column of a date of leaving for which there is no corresponding date of entry, but an actual insertion of a signature which is not required and which is prejudicial to the appellant.

As to the question of jurisdiction, I have not the slightest doubt that this is the very kind of case which the section was intended to include and does include, and that the magistrate had evidence before him on which to base the compensation; he might discount the evidence if he thought fit, but I cannot hold that he was right in saying that there was no evidence before him on which the compensation could be assessed. The case must, therefore, be sent back to the magistrate for adjudication.

Judgment for appellant.

Solicitor for appellant: *W. Holloway.*
Solicitor for respondent: *T. Duerdin Dutton.*

W. J. B.

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Jan. 15, 16.

HADLEY & SON *v.* BEEDOM.

Bill of Sale—Registration—Assignment to Trustees for Benefit of Creditors—Limit of Time for Execution of Deed by Creditors—Exclusion of Creditors not executing Deed within limited Time—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

A debtor assigned all his personal property to trustees for the benefit of his creditors by a deed which was duly registered under the Deeds of Arrangement Act, 1887, but was not registered as a bill of sale. The deed contained a proviso that no creditor, whether scheduled to the deed or not, should be entitled to any benefit under the deed unless he signified to the trustees his assent to the deed within three months of the date of its registration, he having had actual notice of the deed; that the trustees might, at any time, call upon any creditor to assent within seven days, and might, by notice to such creditor not assenting, exclude him from all benefit under the deed; that the trustees should have power at their discretion to revoke and recall any such exclusion and admit any creditor to the benefit of the deed upon receiving his assent; but that they should have no power to admit any creditor who did not assent within the three months:—

Held, that, notwithstanding the imposition of the limit of three months within which a creditor having notice of the deed could assent to and become entitled to the benefit of it, the deed was "an assignment for the benefit of the creditors of the person making or giving the same" within the meaning of s. 4 of the Bills of Sale Act, 1878, and therefore did not require to be registered as a bill of sale.

Ashford v. *Tuite* (7 Ir. C. L. R. 91) approved and adopted.

Appeal from the decision of the judge of the county court of Worcestershire in an interpleader issue. The facts were shortly as follows.

The execution creditors, Messrs. Hadley & Son, who were creditors of the debtor for about 30*l.*, having brought an action to recover the amount of their debt, a meeting of the debtor's creditors was held on November 28, 1893, at which it was resolved to accept a composition of 7*s.* 6*d.* in the pound, payable by three instalments; the execution creditors did not assent to the arrangement. On December 1, 1893, a deed was executed for the purpose of carrying the arrangement into effect, the parties to which were (1.) the debtor, (2.) his father, (3.) two trustees, and (4.) "the several persons, companies and partnership firms being creditors of the debtor whose names and seals

are set and affixed in the schedule hereto or who shall otherwise assent to these presents and who are hereinafter called the creditors." By this deed the personal estate of the debtor was assigned to trustees upon the usual trusts, and a trust was created in favour of the debtor of any surplus remaining after payment of the composition. The deed concluded with the following proviso: "provided lastly and it is hereby declared that no creditor whether scheduled to these presents or not shall be entitled to any benefit under these presents unless he shall signify to the trustees his assent to these presents within three months from the date of the registration of these presents he having had actual notice of these presents And further that the trustees may at any time call upon any creditor to assent within seven days from the date of notice calling upon him to assent and informing him that he will be excluded if he do not assent within such seven days and may by notice to such creditor not assenting exclude him from all benefit hereunder But the trustees shall have power in their discretion to revoke and recall any such exclusion and to admit any such creditor to the benefit of these presents upon subsequently receiving the assent hereto But the trustees shall have no power to admit any creditor who does not assent within the before-mentioned period of three months."

This deed was registered under the Deeds of Arrangement Act, 1887, but was not registered as a bill of sale under the Bills of Sale Acts. The execution creditors were invited to assent to the deed, but refused to do so; and on December 9, 1893, they signed judgment in their action for the amount of their claim. Upon execution being levied, the goods seized were claimed by the trustees under the deed of arrangement, and this interpleader issue was directed to be tried. The learned county court judge held that the deed was not for the benefit of all the creditors, some of whom were excluded from its operation; that it did not therefore come within the exception in s. 4 of the Bills of Sale Act, 1878, in favour of assignments for the benefit of creditors, and required registration as a bill of sale. Judgment having been given in favour of the execution creditors, the claimants appealed.

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Corner, for the claimants. The deed does not require registration under the Bills of Sale Act, 1878; it comes within the exception in s. 4 of that Act in favour of "assignments for the benefit of the creditors of the person making or giving the same." The test to be applied is whether the deed is one in which every creditor has a right to participate, or whether it is a deed by the terms of which any of the creditors are excluded from its benefit. It is admitted that the deed must be for the benefit of all the creditors, but if every creditor has an opportunity of taking advantage of it, if he chooses to do so, the deed is for the benefit of the creditors within the meaning of the Bills of Sale Acts: *General Furnishing Co.* v. *Venn* (1); it is sufficient that it should be a deed for the benefit of all such creditors as should elect to execute it: *Paine* v. *Matthews.* (2) It makes no difference that the deed itself limits the time within which a creditor must come in in order to reap the benefit of the deed: *Ashford* v. *Tuite* (3), where a deed by which property was conveyed to trustees in trust to pay the parties who should execute it within one calendar month was held to be a deed for the benefit of the creditors and not to require registration as a bill of sale. This deed enables, and was intended to enable, every creditor to come in. The provision enabling the trustees to call on any creditor to assent within seven days is analogous to the provision in the Bankruptcy Act by which the trustee in bankruptcy may give notice excluding a creditor who does not come in and prove his debt within a limited time.

Cavanagh, for the execution creditors. The deed is not for the benefit of creditors within the meaning of s. 4; it is prevented from being so by reason of the proviso excluding all creditors who do not come in within a limited time, and also by reason that it contains an imperative trust for the surplus to be paid to the debtor. In *General Furnishing Co.* v. *Venn* (1) and *Paine* v. *Matthews* (2), there was nothing on the face of the deed to exclude any creditor or class of creditors. If a time is fixed within which the creditors must come in under the penalty of

(1) 2 H. & C. 153; 32 L. J. (Ex.) 220. (2) 53 L. T. 872.
(3) 7 Ir. C. L. R. 91.

exclusion from the benefits of the deed, the deed is not for the benefit of the creditors, and it makes no difference that the creditor is to have notice to come in before he can be excluded. The decision in *Ashford* v. *Tuite* (1) has not been cited with approval in any of the subsequent cases, and is not supported by the dicta of the judges in *General Furnishing Co.* v. *Venn* (2); it ought not to be considered as good law. In the analogous case of a trust deed for benefit of creditors under s. 192 of the Bankruptcy Act, 1861, it was held that if a deed had the effect of excluding any creditor it was void, such as a deed which excluded creditors who did not execute it within a given time: *Berridge* v. *Abbott* (3); *Ex parte Morgan, In re Woodhouse* (4); *Dewhurst* v. *Kershaw* (5); and it makes no difference that the deed contains a provision that the trustees must give the creditor a notice before he can be excluded: *Giddings* v. *Penning.* (6) [He also cited *Reg.* v. *Creese* (7); *Wild* v. *Banning* (8); *Ex parte Glen.* (9)]

Corner, in reply. The cases under s. 192 of the Bankruptcy Act, 1861, are not in point. Under that section, if the deed were assented to by a majority in number representing three-fourths in value of the creditors, the non-assenting creditors were bound by the deed, and it was therefore necessary that the statutory requirements should be strictly complied with.

LAWRANCE J. I have arrived at the conclusion, though not without some difficulty, that the learned county court judge was wrong. The sole question is whether this deed comes within the exception in s. 4 of the Bills of Sale Act, 1878; that is, whether it is for the benefit of all the creditors of the debtor. It is said to be invalid because it has the effect of excluding a class of creditors from all benefit under it; those creditors, that is to say, who have notice of the deed and who do not assent to it within three months after registration; reliance is also placed

(1) 7 Ir. C. L. R. 91.
(2) 2 H. & C. 153; 32 L. J. (Ex.) 220.
(3) 13 C. B. (N.S.) 507.
(4) 32 L. J. (Bank.) 15.
(5) 1 H. & C. 726; 32 L. J. (Ex.) 146.
(6) Law Rep. 1 Ex. 325.
(7) Law Rep. 2 C. C. 105.
(8) Law Rep. 2 Eq. 577.
(9) Law Rep. 2 Ch. 670.

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upon the fact that the trustees have no power to admit any creditor to the benefit of the deed who does not assent within that period. It is abundantly clear that if any creditor is excluded by the deed itself, the deed is invalidated; the deed must be for the benefit of all the creditors, including any creditor who may choose to come in; if every creditor has the right under the deed to come in and take the benefit of its provisions, the result of the whole of the cases is that the deed is for the benefit of creditors and does not require registration as a bill of sale. Then is there any exclusion because of the provision fixing a limit of three months within which the creditors must assent? Upon this point I am much pressed by the Irish case of *Ashford* v. *Tuite* (1), which, if it is good law, clearly is in point in the present case; it is sufficient for me to say that I cannot dissent from that decision, and that I adopt it. The other cases cited really come to this, that where the creditors have an opportunity, if they choose, of assenting, the deed is good; the decision in *Paine* v. *Matthews* (2) is clear on that point. In all the cases cited in which the deed has been held to be void there has been either an actual exclusion of some creditor or class of creditors, or there has been a provision for paying some of the creditors in full and others at a lesser rate, which would clearly not be for the benefit of all the creditors. There is nothing of the kind that I can see in this deed; there is nothing to support the respondents' argument beyond the proviso that the power which the trustees have to extend the time which is given to them in cases where they have called on the creditor to assent within seven days cannot be exercised by them where the creditor does not assent within the three months. But I do not think that that invalidates this deed, and our judgment ought to be in favour of the appellants.

KENNEDY J. I have come to the same conclusion. The case is deserving of full argument, and I differ with great respect from the learned county court judge. There is no dispute as to the principle upon which we have to decide whether the deed comes within the exception in s. 4 of the Bills of Sale Act, 1878;

(1) 7 Ir. C. L. R. 91.

(2) 53 L. T. 872.

if it is not for the benefit of all the creditors, it is not within the exception. This principle may be stated in another way, that the deed is not within the exception if it excludes any class of creditors, or excludes any creditors nominatim. But when the phrase "for the benefit of all the creditors" is used, it must be borne in mind that the creditors cannot have a benefit forced upon them; they must accept it; and therefore, if we find a deed which gives the benefit of the assignment to every creditor who may choose to avail himself of it, a deed from which no creditor can exclude himself without notice, and therefore without the opportunity, to assent to it, we have a deed which is for the benefit of all the creditors. In other words, every creditor, before the expiration of the time limited, must have the opportunity of coming in and assenting to it and accepting its benefits. In the present case everybody can come in and assent to the deed, which satisfies the test I have referred to; it does not exclude any class of creditors, neither does it provide for any class at the expense of the rest. The deed does, indeed, contain a time limit within which creditors may come in and take the benefit, and if there were no provision that that time limit is to be itself subject to the limitation that the creditor must have had actual notice of the deed, I do not say what view I should take of the case; for example, had it provided merely that creditors must come in within three months from the date of registration, the question would have been a very different one; but the provision is that no creditor is to be entitled to the benefit of the deed unless he signifies his assent to it within three months of registration, he having had actual notice of it; nobody, therefore, is excluded from the benefit of the deed who does not wish to be. That is, I think, the answer to the considerations which influenced the learned county court judge; he says that the deed must be read as excluding a certain class of creditors, because it contains words which impose a time limit on their right to come in; he realizes, indeed, the fact that every creditor must have actual notice of the deed; but he attacks the deed for two reasons, first, because of the imposition of the time limit; secondly, because it contains a provision enabling the trustees to call on a creditor to assent within seven days from

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the date of notice, and to exclude him on non-compliance. We must not, however, assume, when we find a provision enabling the trustees to call on the creditors to assent, that the trustees will not act reasonably, and the same remark applies to the time limit of three months. It has been suggested that the trustees might give the notice at the last hour of the three months, and that then there would be no time for the creditor to comply with it. On such a state of facts I do not think that the creditor would have a bad case, and I doubt whether a successful attempt could be made to exclude him. The notice must be reasonable: it is no notice to do a thing, unless it gives a reasonable time in which to do it. I think, therefore, that there is no exclusion of any creditor by this deed, and I am prepared to decide the case on principle and without reference to authority.

It is not said that there is any decision upon s. 4 of the Bills of Sale Act, 1878, which is contrary to the view that I have expressed. The case of *Ashford* v. *Tuite* (1), which was a considered judgment, is indeed very much in point. In that case the deed was held to be for the benefit of the creditors, although the trust created by it was only for the payment of those creditors who should execute the deed within one month from its date. It might be said that that amounted to an exclusion of the creditors who did not assent within the time limited, for the deed did not provide for notice to the creditors, but it was held a good deed for the purpose for which it was set up—that is, a good deed for the benefit of creditors generally. Monahan C.J. says in his judgment: "But, it may be asked, does not the provision that this deed was to be executed within a certain number of days shew that it was not to have been for the benefit of all the creditors? We are of opinion that it does not." That deed, therefore, was held to come within s. 7 of the Bills of Sale Act, 1854. It has been suggested that there are dicta in *General Furnishing Co.* v. *Venn* (2) which are contrary to that decision; but I see nothing in the last-named case contrary to the principle to which I have referred—a principle which was carried further in *Ashford* v. *Tuite* (1) than we are carrying it here. The present deed seems to me clearly to be

(1) 7 Ir. C. L. R. 91. (2) 2 H. & C. 153; 32 L. J. (Ex.) 220.

an assignment for the benefit of all the creditors; they need not accept its benefits, but they ought to have, and they have, the opportunity of accepting them.

Appeal allowed; leave given to appeal.

Solicitor for appellants: *J. B. Matthews, Worcester.*
Solicitor for respondents: *T. G. Dobbs, Worcester.*

W. J. B.

PAYNE *v.* WILSON.

1894 *Dec.* 11.
1895 *Jan.* 21.

Sale of Goods—Possession of Goods under Agreement to Purchase—Hire and Purchase Agreement—Sale by Hirer to bonâ fide Purchaser without Notice—Conviction of Hirer for Larceny as Bailee—Revesting of Property in Goods in Original Owner—Order for Restitution—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *ss.* 3, 100—*Factors' Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 9—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 21, 24; *s.* 25, *sub-s.* 2.

The plaintiff let a piano under a hire and purchase agreement, by which the piano was to remain the property of the plaintiff until all the monthly instalments provided for by the agreement were paid by the hirer. Before all the instalments were paid the hirer sold the piano to the defendant, who bought it in good faith and without notice of any lien or other right of the plaintiff. The hirer was prosecuted by the plaintiff for larceny as a bailee and was convicted. An application by the plaintiff under the Larceny Act, 1861, s. 100, for restitution of the piano having been refused, the plaintiff sued the defendant for conversion of the piano:—

Held, that, the hirer being a person who had agreed to buy the piano within the meaning of s. 9 of the Factors' Act, 1889, the delivery or transfer of the piano by him to the defendant had the same effect as though he were a mercantile agent in possession of it with the consent of the true owner; that the property in the piano did not, on the hirer's conviction, revest in the plaintiff, and that the defendant had acquired a complete and permanent title to the piano.

APPEAL from a decision of the judge of the Whitechapel County Court. The following statement of facts is substantially taken from the written judgment of the Divisional Court.

The plaintiff, a pianoforte manufacturer, sought to recover from the defendant damages for the conversion of a piano. The facts were admitted and were substantially these. In November, 1892, the plaintiff let a piano to one Sullivan under a hire and purchase agreement in writing, by which the piano was to be

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paid for by a number of equal monthly payments, and until all such payments were made it was to continue the property of the plaintiff. The agreement was identical in form with that in *Helby* v. *Matthews*. (1) Before Sullivan had paid all the instalments he, in March, 1894, sold the piano to the defendant, who bought and received it in good faith and without notice of any lien or other charge of the plaintiff. In June, 1894, the plaintiff prosecuted Sullivan at the London Sessions for larceny as a bailee, and obtained his conviction. After the conviction the counsel for the prosecution applied to Sir Peter Edlin, who had tried the case, for an order of restitution against the defendant under 24 & 25 Vict. c. 96, s. 100; but this was refused. The plaintiff then made a formal demand on the defendant to give up the piano, and on his declining to do so brought the present action for conversion. The learned county court judge gave judgment for the defendant, and the plaintiff appealed.

1894. Dec. 11. *Cluer*, (*Groser*, with him) for the plaintiff. The property in the piano revested in the plaintiff on the conviction of Sullivan. The fraudulent conversion of property to his own use by a bailee is declared to be larceny by s. 3 of the Larceny Act (2); the offence of which Sullivan was convicted

(1) [1894] 2 Q. B. 262.

(2) By 24 & 25 Vict. c. 96, s. 3, "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny."

By s. 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative"; and power is given to the Court before whom the trial takes place to award a writ of restitution, or to order the restitution of the property in a summary manner, "provided that . . . . nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanour against this Act."

By 52 & 53 Vict. c. 45 (Factors' Act, 1889), s. 9, "Where a person,

was therefore larceny. Then, by s. 100, the owner of stolen property who prosecutes the thief to conviction is to have restitution of his property; the proviso that the section is not to apply to the prosecution of trustees, bankers, merchants, attorneys, factors, brokers or other agents intrusted with the possession of goods for any misdemeanour against the Act is inapplicable to the present case, where the prosecution was for a felony; the plaintiff is therefore entitled under s. 100 to the restitution of his piano. It will be contended by the defendant that s. 9 of the Factors' Act, 1889, which is practically re-enacted in s. 25, sub-s. 2, of the Sale of Goods Act, 1893, allows a person in the position of Sullivan to give a good title to a person buying bonâ fide and without notice of the claim of the true

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having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." This section is repeated totidem verbis in s. 25, sub-s. 2, of the Sale of Goods Act, 1893, except that the words "or under any agreement for sale, pledge, or other disposition thereof" are there omitted.

By 56 & 57 Vict. c. 71 (the Sale of Goods Act, 1893), s. 21, sub-s. 1. "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." By sub-s. 2, "Provided that nothing in this Act shall affect (*a*) the provisions of the Factors' Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof."

By s. 24, sub-s. 1, "Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise." By sub-s. 2, "Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

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owner; but although a primâ facie title may thus be acquired, the Factors' Act does not repeal the rule of the common law as to restitution of stolen property as expressed in s. 100 of the Larceny Act. The revesting of the property in stolen goods upon the conviction of the offender is provided for by s. 24, sub-s. 1, of the Sale of Goods Act, 1893, which practically re-enacts the old law on the subject; the proviso in s. 21, sub-s. 2 (*a*), that nothing in the Act is to affect the provisions of the Factors' Acts has no application to s. 24, sub-s. 1, for the provision as to the revesting of the property does not affect the Factors' Acts. The provision in s. 24, sub-s. 2, of the Sale of Goods Act, 1893, that in the case of fraudulent obtaining of goods by means not amounting to larceny the property in the goods is not to revest by reason only of the conviction of the offender, was inserted in order to get rid of the effect of the decision in *Bentley* v. *Vilmont* (1); it has no application to the present case, in which the goods were stolen and the conviction was for larceny. The defendant cannot succeed, unless he can shew that s. 100 of the Larceny Act has been impliedly repealed by subsequent legislation.

Jelf, Q.C. (*Herbert Smith*, with him), for the defendant. The defendant acquired an indefeasible title to the piano under the sale from Sullivan. It is clear that under the decisions in *Lee* v. *Butler* (2) and *Helby* v. *Matthews* (3) Sullivan was in the position of a mercantile agent in possession of the piano with the consent of the owner, within the meaning of s. 9 of the Factors' Act, 1889, and that the sale by Sullivan operated to pass the property to the defendant and to give him a good title to the piano. The only question is whether, upon the conviction of Sullivan, the property in the piano revested in the plaintiff by virtue of any statutory enactment. It seems clear that the property did not revest in the plaintiff by virtue of s. 100 of the Larceny Act, for that section expressly excepts from its operation the prosecution of persons in the position of Sullivan. Nor did it vest in the plaintiff by virtue of s. 24, sub-s. 1, of the Sale of Goods Act, 1893; that section applies only where goods have

(1) 12 App. Cas. 471. (2) [1893] 2 Q. B. 318.
(3) [1894] 2 Q. B. 262.

been "stolen"—that is, stolen in the sense in which that word is used in 21 Hen. 8, c. 11; it has no application to the statutory offence of larceny by a bailee, which is a wholly different offence from ordinary larceny, although it may be punishable in the same way. Apart from the provisions in the Factors' Act, 1889, which are embodied in the Sale of Goods Act, 1893, the property did not revest in the plaintiff on Sullivan's conviction, and a fortiori s. 100 of the Larceny Act cannot apply to the case of a bailee who has acquired the rights of a factor. The question is really concluded by s. 21, sub-s. 2 (*a*), of the Sale of Goods Act, 1893, for it is obvious that a revesting of the property under s. 24, sub-s. 1, must affect s. 9 of the Factors' Act, 1889, which has been held to give to a person in the position of Sullivan the right to give a good title to a person in the position of the defendant.

Cluer, in reply.

Cur. adv. vult.

1895. Jan. 21. The written judgment of the Court (Pollock B. and Grantham J.) was delivered by

POLLOCK B. (After stating the facts as above, the learned judge proceeded.) In order to arrive at the respective rights of the parties, the first question to be settled is, What was the relative position of the plaintiff and Sullivan? The agreement between them appears to be in form identical with that which came before the Court of Appeal in *Helby* v. *Matthews* (1), when the Court held that it was an agreement of sale; that the person who in that case was in the same position as Sullivan in the present case was a person who had bought or agreed to buy the piano. The same conclusion was arrived at in *Lee* v. *Butler* (2) with respect to an agreement, the terms of which slightly varied from that under discussion in *Helby* v. *Matthews*. (1) The next question to consider is, What are the legal rights between the plaintiff and the defendant, who bought the piano from Sullivan in good faith and without notice of any title or lien of the plaintiff? For this purpose it becomes necessary to deal with two independent series of legislation. First, the statutes by which, in accordance with the maxim, "Spoliatus debet ante omnia restitui," the owner of goods which have been stolen from him

(1) [1894] 2 Q. B. 262. (2) [1893] 2 Q. B. 318.

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may obtain their restitution upon the prosecution and conviction of the thief.

As to these, before the Act of Henry VIII. there was no restitution of stolen goods on indictment of the thief; the owner could only obtain possession of them by bringing an appeal of robbery. An account of this procedure will be found in 3rd Inst. 242, and 2 Hawk. P. C. 242 (1); and in 2 Hawk. P. C. 249, it is stated that it is necessary to use the words "felonice cepit." By 21 Hen. 8, c. 11, it was provided that "if any felon or felons hereafter do rob or take away" any money, goods, or chattels, &c., "and the felon be indicted and found guilty thereof," the party so robbed or owner shall be restored to the said money, goods, or chattels.

This Act was repealed by 7 & 8 Geo. 4, c. 27, and by 7 & 8 Geo. 4, c. 29, s. 57, it was re-enacted in substance, the words used being "if any person guilty of any felony or misdemeanour as aforesaid in stealing, taking, obtaining, or converting any chattels, &c.," shall be indicted by the owner of the property, and convicted, the property shall be restored to the owner.

Thus far it will be seen that in order to obtain restitution there must have been a robbery or stealing, a prosecution by the owner, and a conviction, and that the right of restitution did not exist where the dealing with the goods by a vendee or bailee was fraudulent but not criminal, but did exist in all cases in which it was criminal. The Act at present in force as to the restitution of stolen goods is 24 & 25 Vict. c. 96. By s. 100 of that Act, "If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said pro-

(1) 8th ed.

perty, or to order the restitution thereof in a summary manner." After dealing with cases in which the property stolen consists of valuable securities or negotiable instruments, the section continues: "Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against this Act."

This, for the first time, provides for the particular class of cases in which there may have been a criminal stealing or taking, and a prosecution by the owner, and yet no restitution. This, no doubt, is so provided in consequence of the creation of a new offence by this same Act.

Before the passing of this Act there could, speaking generally, be no larceny by a bailee whose original receipt of the goods was lawful; but by s. 3 it was provided that "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny."

The provisions of s. 100 would therefore, but for the proviso, have applied to any larceny by a bailee within s. 3. But that proviso excepts cases of thefts by trustees, bankers, merchants, attorneys, factors, brokers, or other agents intrusted with the possession of goods, &c., thereby drawing a distinction between a possession by ordinary bailees and that by merchants, factors, brokers, or other agents intrusted with the possession of goods or documents of title to goods. These words would not, however, include a person who held a piano or other chattel as Sullivan did under a sale or hire agreement. It now becomes necessary to consider how far the case is affected by what are called the Factors' Acts. Prior to 1889 those Acts applied only to sales or pledges by factors, brokers, or mercantile agents, and protected only those who by a bonâ fide sale or pledge obtained goods from such agents, and did not apply to the case of a bailee to whose employment a power to sell is not ordinarily incident,

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as of a person who holds under an agreement for sale and return. (See *Monk* v. *Whittenbury* (1), and *Cooper* v. *Willomatt.* (2))

As, however, these and similar agreements became more common, the hardship of the law of restitution in cases where owners of goods had parted with them under a voluntary contract of sale was strongly felt and was expressed by the House of Lords in the case of *Bentley* v. *Vilmont* (1887) (3); the legislature therefore again interfered, and by the Factors Act, 1889, this protection was extended to dealings by way of sale or pledge to innocent purchasers by persons who could not properly be called factors or mercantile agents.

By s. 9 of this Act it is provided that "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

This Act does not in terms repeal or allude to the 24 & 25 Vict. c. 100; but according to *Helby* v. *Matthews* (4) Sullivan was a person who had "bought or agreed to buy" the piano within the meaning of this section, and by the section itself the delivery or transfer by him had the same effect as if he was a mercantile agent in possession of the piano with the consent of the true owner; and in our judgment the true conclusion to be drawn from the joint effect of the statutes and decisions is that the defendant in this case acquired a complete and permanent title to the piano, and is not liable to restore it to the plaintiff.

One more statute which was relied upon by the plaintiff's counsel remains to be noticed, namely: The Sale of Goods Act, 1893, by s. 24 provides that "(1.) Where goods have

(1) 2 B. & Ad. 484.
(2) 1 C. B. 672.
(3) 12 App. Cas. 471.
(4) [1894] 2 Q. B. 262.

been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them whether by sale in market overt or otherwise.

"(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

This Act is more recent than any of those we have already noticed, and the language used in s. 24, sub-s. 1, is, no doubt, capable of a construction which would make it include the present case; but it must be remembered that this Act was passed to consolidate what was assumed to be the existing law by which sales of goods were regulated, and although the words "where goods have been stolen" are general, we do not consider their application is necessarily universal. On the contrary, we think the true mode of dealing with them is to treat them as subject to the express limitations already created by statute, especially when the reasons for these limitations are apparent, and have been so recently noticed and dealt with by the House of Lords in the case of *Bentley* v. *Vilmont* (1), and by the legislature. It is to be noticed, also, that the language we are dealing with occurs in a group of sections commencing with s. 21, which is headed by the words "Transfer of Title," and by sub-s. 2 of that section it is expressly provided that nothing in the Act shall affect the provisions of the Factors' Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

For these reasons we think the judgment of the county court judge was right, and should be affirmed.

Appeal dismissed.

Leave given to appeal.

Solicitor for plaintiff: *H. E. Tudor.*

Solicitors for defendant: *Proudfoot & Chaplin.*

(1) 12 App. Cas. 471.

W. J. B.

C. A.

1895

March 4.

[IN THE COURT OF APPEAL.]

GUARDIANS OF THE POOR OF WEST HAM UNION, APPELLANTS; CHURCHWARDENS, OVERSEERS, AND GUARDIANS OF THE POOR OF ST. MATTHEW, BETHNAL GREEN, RESPONDENTS.

Poor Law—Guardians—Limitation of Time for Payment of Debt—Costs of Appeal given by House of Lords—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict. c.* 49), *s.* 1.

Where a judgment of the House of Lords directed payment of the costs of the appeal by the guardians of a parish:—

Held, that a debt became due from them in respect of such costs immediately upon the delivery of the judgment, and not when the judgment was drawn up, or when the costs were taxed; and therefore, after the expiration of the period specified by the Poor Law (Payment of Debts) Act, 1859, from the date of the delivery of the judgment, the payment of the costs could not be enforced.

APPEAL from the order of a Divisional Court (Wills and Wright JJ.) refusing to set aside a stay of execution as aftermentioned.

On March 20, 1894, the House of Lords gave judgment in an appeal from an order of the Court of Appeal, which affirmed an order of a Divisional Court upon a case stated by quarter sessions on an appeal against an order of removal. The judgment of the House of Lords was that the order of the Court of Appeal should be reversed, and judgment should be entered for the appellants, the respondents to pay the costs both in the House of Lords and in the Courts below; and that the case should be remitted to the Queen's Bench Division. (1)

The then current half-year for the purpose of making up the poor law accounts of the union ended on March 25. On April 2 the chief clerk of the Judicial Department of the House of Lords sent to the parties a draft of the judgment as he proposed to draw it up, by which it was ordered that the respondents should pay to the appellants the costs incurred by them in the Courts below, and also the costs incurred by them in respect of the appeal to the House of Lords, the amount of such last-mentioned costs to be certified by the clerk of the parliaments.

(1) See [1894] A. C. 230.

The respondents returned the draft altered by striking out that part of it which gave to the appellants the costs in the Courts below on the ground that there was no power to give those costs. (1)

On April 12 the respective solicitors of the parties attended before the clerk of the House to settle the terms of the judgment, when he suggested that they should deposit statements in writing of their respective contentions on the matter. This was accordingly done, the respondents setting up a further contention that the part of the judgment which gave the appellants the costs in the House of Lords should also be struck out on the ground that there was no power to give those costs.

On May 31 the solicitors of the parties again appeared before the clerk of the House to settle the draft of the judgment, when he directed the matter to be referred to the Appeal Committee of the House of Lords.

Ultimately, upon June 8, the matter was brought before the Appeal Committee, who, without expressing any opinion as to the power to give costs, declined to alter the terms of the order as to costs, Lord Herschell L.C. saying that the matter ought to have been mentioned when judgment was pronounced, and that, if it turned out that per incuriam costs had been given when there was no power to give them or to enforce them, they would not be enforced. (2)

On June 12 the draft judgment, which was drawn up and bore date as of March 20, was finally settled by the clerk of the House as originally drawn. On July 4 an appointment to tax the costs in the House of Lords was obtained, and on July 10 the costs were taxed. On August 3 the clerk of the parliaments gave his certificate of the amount of these costs. On October 24 the appellants obtained an order of the Queen's Bench Division making the order of the House of Lords as to costs an order of the High Court for the purpose of enforcing it by execution. The respondent guardians then obtained in the Queen's Bench Division ex parte an order staying execution against them on the order.

(1) See *London County Council* v. *Churchwardens of West Ham* ([1892] 2 Q. B. 173).

(2) [1894] A. C. 242.

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GUARDIANS OF WEST HAM UNION v. CHURCHWARDENS, &c., OF ST. MATTHEW, BETHNAL GREEN.

The appellants subsequently applied to the Divisional Court to set aside the order staying execution, which they refused to do on the ground that the debt created by the order of the House of Lords was barred by virtue of the provisions of the Poor Law (Payment of Debts) Act, 1859, s. 1. No question was raised either in the Divisional Court or in the Court of Appeal as to the costs in the Courts below, which were given by the judgment of the House of Lords, the appellants abandoning their claim to them, and seeking to enforce only their claim for costs in the House of Lords. (1)

Jelf, Q.C., and *R. Cunningham Glen*, for the appellants. There was no debt which had become due in respect of these costs within the meaning of the statute until the amount due had been ascertained by taxation, or at any rate until the judgment of the House of Lords had been drawn up. The statute cannot be intended to run against the persons to whom the debt is due before they can take any step to enforce the liability. There

(1) 22 & 23 Vict. c. 49, s. 1: "With respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards; the commencement of such half-year to be reckoned from the time when the last half-year's account should or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board: Provided, that the Poor Law Board, by their order may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand."

By s. 4, "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided; and all proceedings taken by mandamus or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section."

was no laches on the part of the appellants. Until the issue of the judgment as drawn up on June 12 there was no order of the House of Lords that could be made a rule of the Queen's Bench Division for the purpose of enforcing it.

[LOPES L.J. referred to *Marbella Iron Ore Co. Limited* v. *Allen.* (1)]

Finlay, Q.C., and *Beven*, for the respondents, were not called upon to argue.

LORD ESHER M.R. In my opinion the order of the Divisional Court was right. There was clearly in respect of these costs a debt which was constituted by the judgment of the House of Lords. When was that judgment given? It was given, in my opinion, on March 20. There cannot be any doubt, I think, that, when the Lord Chancellor has put the question and the resolution of the House upon it has been pronounced, the judgment is then given. The exact terms in which that judgment is to be drawn up have no doubt to be subsequently settled by the proper officer. If the matter presents any difficulty or complication he may consult with the solicitors, or perhaps with the counsel of the parties, as to the exact terms in which it is to be drawn up; but it is impossible to suppose the process of drawing up the judgment is anything but a merely ministerial act. I think, therefore, that a debt was constituted by the judgment which was given on March 20. By s. 1 of the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), it is provided that, "with respect to any debt, claim, or demand which may after the passing of this Act be lawfully incurred by or become due from the guardians of any union or parish, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, &c." It appears to me that there was within the meaning of those words a debt for costs which became due on March 20, and, the period from that date mentioned by the section having expired, the payment of the debt cannot now be enforced. Sect. 4 of the statute does not appear to me to apply to the circumstances

(1) 38 L. T. 815.

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GUARDIANS OF WEST HAM UNION v. CHURCHWARDENS, &c., OF ST. MATTHEW, BETHNAL GREEN.

of the present case. For these reasons I think the appeal should be dismissed.

LOPES L.J. We are not called upon to express any opinion as to the power of the House of Lords to give costs in this case. The point we have to decide really turns entirely on the question when the debt in respect of these costs must be considered to have become due. It appears to me that it became due when the judgment was given, and that took place on March 20. The current poor law half-year ended on March 25. Therefore, after the lapse of a period of five days and three months from the giving of the judgment, the debt became barred under s. 1 of 22 & 23 Vict. c. 49, which provides that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year. The facts of the present case do not bring it within s. 4 of the Act. It is said that our decision imposes great hardship on the appellants. If that be so, we cannot help it. We can only deal with the case in accordance with the terms of the statute. The intention with which the legislature passed the statute obviously was that subsequent ratepayers should not be called upon to pay debts which had been incurred before their time.

RIGBY L.J. I am of the same opinion. For myself, although it is not necessary to express any opinion on the point, I must say I have no doubt that the House of Lords had jurisdiction in this case to give the costs of the appeal to that House. With regard to the point which we have to decide, the foundation of the view which I take is that a debt for these costs was created on March 20, when the House of Lords pronounced the resolution, which is their mode of giving judgment, awarding these costs to the appellants. Those who engage in litigation with bodies such as guardians ought to know that they are subject to special statutory provisions, and must look into the statutes and see what their powers are. Therefore these appellants must be taken

to have known of the provisions of the statute now in question, and that these costs could only be paid within the current half-year or within three months after its expiration, namely, before June 25. They nevertheless took no step to enforce payment of these costs during that period. Even if the taxation were capable of being regarded as such a step, that did not take place within that period. It is not necessary to say more with regard to s. 1 of the Act than that I am satisfied that the judgment of the House of Lords on March 20 created on that day a debt, claim, or demand within the meaning of the section. Then with regard to the provisions of s. 4, which in certain cases extends the time within which a debt may be paid by guardians, it is clear that in this case no step was taken which could bring it within that section. Nothing was done to enforce payment until the order of the House of Lords was made a rule of the Queen's Bench Division. The appellants might have endeavoured to get an earlier taxation of the costs. They might have applied to the House of Lords to enforce their own order. But they did nothing. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *F. E. Hilleary.*
Solicitor for respondents: *R. Voss, for W. T. Howard.*

E. L.

C. A.
1894
Aug. 7.

[IN THE COURT OF APPEAL.]

ANDERSON *v.* GORRIE AND OTHERS.

Judge—Court of Record of Colony—Act done in exercise of Judicial Office—Malicious Motive—Immunity from Action.

No action lies against a judge of the Supreme Court of a colony in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice.

APPEAL from a judgment of Lord Coleridge C.J. in favour of the defendant Cook, at the trial with a jury.

The action was brought against three defendants, who were judges of the Supreme Court of Trinidad and Tobago, to recover damages for certain acts done by the defendants in the course of certain judicial proceedings, which acts were alleged to have been done maliciously and without jurisdiction and with knowledge of the absence of jurisdiction.

One of the acts complained of was that a rule was issued against the plaintiff calling upon him to shew cause why he should not be dealt with for contempt of Court in petitioning Her Majesty with regard to certain actions in the island of Tobago in which he had been defendant, and as to which he considered that he had a grievance. The rule was not applied for by any person, but was issued by the Supreme Court in Trinidad. The defendant appeared to shew cause, and after several adjournments the rule was discharged.

Another of the acts complained of was that the plaintiff attended before the defendant Cook to be examined as to his means of satisfying certain judgments. The examination was adjourned, and the plaintiff, under certain rules of Court enacted by the local Judicature Ordinance of 1879, was ordered to find bail, which was fixed at the sum of 500*l.*, with one surety for the like amount. In default of finding bail the plaintiff was committed to prison, and an application for a habeas corpus to determine the validity of the committal was refused by the defendant Cook.

The first defendant named in the action died before the hearing.

The jury found, as to another of the defendants, a verdict in his favour, and judgment was entered accordingly.

As to the defendant Cook, the jury found that he had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice, and they assessed the damages at 500*l.*

The learned judge directed judgment to be entered for the defendant Cook, on the ground that no action will lie against a judge of a Court of Record in respect of acts done by him in his judicial capacity.

The plaintiff appealed.

The plaintiff in person. The immunity of a judge is confined to judicial acts—namely, acts done by him as a judge under his authority from the Crown and within his jurisdiction: *Houlden* v. *Smith* (1); *Ex parte Fernandez* (2); *Kemp* v. *Neville.* (3) If he acts maliciously he is liable to an action: *Kendillon* v. *Maltby* (4); and per Cockburn C.J. in *Thomas* v. *Churton* (5) and *Dawkins* v. *Paulet.* (6) The defendant's acts complained of were ministerial and not judicial, and he is not entitled to the immunity claimed.

[He also referred to Hawkins' Pleas of the Crown, bk. 2, c. 1, ss. 1, 3, 9, 17; *Floyd* v. *Barker* (7); *Ashby* v. *White* (8); *Calder* v. *Halket* (9); *Taaffe* v. *Downes.* (10)]

Adam Walker, (*Harold Hodge*, with him), for the defendant. The acts complained of were judicial acts, and a long series of cases have established the immunity of a judge in such a case, and that the question of motive is immaterial. [He cited *Haggard* v. *Pelicier Frères* (11); *Scott* v. *Stansfield* (12); *Fray* v. *Blackburn* (13); *Dicas* v. *Lord Brougham.* (14)]

[He was stopped.]

The plaintiff, in reply.

(1) 14 Q. B. 841.
(2) 10 C. B. (N.S.) 3.
(3) 10 C. B. (N.S.) 523.
(4) Car. & M. 402.
(5) 2 B. & S. 475, 479.
(6) Law Rep. 5 Q. B. 94; 9 B. & S. 768.
(7) 12 Rep. 23.
(8) 1 Sm. L. C. 9th ed. p. 268, at p. 274.
(9) 3 Moo. P. C. 28.
(10) 3 Moo. P. C. 36, n.
(11) [1892] A. C. 61.
(12) Law Rep. 3 Ex. 220.
(13) 3 B. & S. 576.
(14) 6 C. & P. 249.

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LORD ESHER M.R. In this case an action was brought by the plaintiff against several judges of the Supreme Court of a colony for damages for wrongful acts done by them in commiting him for contempt of Court, and in holding him to excessive bail.

The defendants were judges of a Supreme Court in a colony, and the first question is whether these matters were matters with which they had jurisdiction to deal. As to the contempt of Court, it cannot be denied that they had jurisdiction to inquire whether a contempt had been committed, and, further, it cannot be denied that they had power to hold a person to bail in the cases provided for by the colonial statute which expressly gives that power. These two matters were obviously within the jurisdiction of the Court. No one can doubt that if any judge exercises his jurisdiction from malicious motives he has been guilty of a gross dereliction of duty; but the question that arises is what is to be done in such a case. In this country a judge can be removed from his office on an address by both Houses of Parliament to the Crown. In a colony such an address is not necessary. The governor of the colony represents the Sovereign, and over him is the Secretary of State for the Colonies, who represents Her Majesty, and can direct the removal of the judge. But the existence of a remedy would not in either of these cases of itself prevent an action by a private person; so that the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice. That is the ground stated in *Miller* v. *Hope* (1), in the year 1824, by Lord Gifford in his judgment in the House of Lords; and in 1892, in *Haggard* v. *Pelicier Frères* (2), Lord Watson says: "It is due to the appellant to state that the respondents in their pleadings make no imputation of dishonesty, although their Lordships do not mean to

(1) 2 Shaw Sc. App. Cas. 125. (2) [1892] A. C. 61, at p. 68.

suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position." Crompton J. in *Fray* v. *Blackburn* (1), said: "It is a principle of our law that no action will lie against a judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. . . . The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

The reasons for the rule were more fully stated by Kelly C.B. in *Scott* v. *Stansfield* (2), and the only difficulty that has ever been raised on the point was that raised by Cockburn C.J. in *Thomas* v. *Churton*. (3) In that case the Chief Justice said: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action." All I can say is, that I am convinced that had the question come before that learned judge he must and would, after considering the previous authorities, have decided that the action would not lie. That case was decided in 1862, and there are subsequent cases that confirm the principle which I have stated to be derived from the common law. The case of General Picton, *Reg.* v. *Picton* (4), has been cited to us; but it cannot be alleged that General Picton was acting as a judge, and therefore that case has no bearing on the matter before us. To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction. It follows from what I have said that, taking the findings of the jury to be true to the

(1) 3 B. & S. 576, at p. 578.
(2) Law Rep. 3 Ex. 220.
(3) 2 B. & S. 475, at p. 479.
(4) 30 How. St. Tr. 225.

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fullest extent, the action will not lie against the defendant, and the appeal must be dismissed.

KAY L.J. I am of the same opinion. I take the law to be clear that for an act done by a judge in his capacity of judge he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen. It cannot be denied that all the acts complained of were done by the defendant in his capacity of judge, and whether he acted rightly or wrongly cannot be questioned in this action. Agreeing entirely with what the Master of the Rolls has said, and with the judgment of Kelly C.B. in *Scott* v. *Stansfield* (1), I come to the conclusion that this action will not lie.

A. L. SMITH L.J. I concur. I believe it to be settled law that if a judge of a Court of Record in the course of his office does an act, even though he does it maliciously, an action will not lie against him at the suit of the person aggrieved. The plaintiff tried to get outside that rule by saying that the acts done by the defendant were not done in the course of his office; but that contention is not well founded. It is contrary to the allegations of the statement of claim, and has been negatived by the jury by their finding that the defendant overstrained his judicial powers. The appeal must be dismissed.

Appeal dismissed.

The plaintiff in person.

Solicitor for the defendant: *W. G. Hooper.*

(1) Law Rep. 3 Ex. 220.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1895
March 8.

MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER, APPELLANTS; McADAM (SURVEYOR OF TAXES), RESPONDENT.

Revenue — Income Tax — Exemption — Public Library — Urban Authority — "Building the Property of a Literary or Scientific Institution" — Public Libraries Act, 1892 (55 & 56 *Vict. c.* 53), *ss.* 4, 11, 12, 14 — *Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *No. VI.*

A public library vested in a library authority under the Public Libraries Act, 1892, is not "a building the property of a literary or scientific institution" within the meaning of the Income Tax Act, 1842, s. 61, No. VI., and therefore the authority is not entitled to exemption from income tax in respect of such a library under that section.

So *held* by Lindley L.J. and Rigby L.J., Lord Esher M.R. dissenting.

APPEAL from the judgment of a Divisional Court (Wright and Collins JJ.) upon a case stated by Commissioners for Income Tax.

The facts stated by the case, so far as material, were as follows.

The corporation of Manchester had appealed against four assessments of 2000*l.*, 70*l.*, 150*l.*, and 63*l.* respectively, made upon them under Schedule A of the Income Tax Act, 1842, as the annual values of four buildings, namely, the Reference Library in King Street, the Free Library in Every Street, the Free Library in Livesey Street, and the Public Reading Room in Hyde Road, all in the city of Manchester, which buildings were used as free libraries for the city of Manchester, and were together with other similar buildings known as the "Manchester Public Free Libraries." It was contended that the corporation of Manchester was not liable to pay income tax in respect of those buildings, on the ground that they were within the exemption created by the Income Tax Act, 1842, s. 61, No. VI.

Each of the four buildings was used for the purpose of a public library, duly established under the Public Libraries Act, 1850, and formerly maintained under the Acts repealed by the Public Libraries Act, 1892, and now maintained under that Act.

All the requirements of the Public Libraries Acts as to their

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adoption or application in the city of Manchester, the purchase or appropriation of sites and buildings, the obtaining the necessary approvals and sanctions and otherwise, had been complied with in respect of each of the four buildings, and the buildings were vested in the corporation of Manchester as a library authority under and in pursuance of the Public Libraries Act, 1892.

The libraries were under the general management of a committee appointed in pursuance of s. 15, sub-s. 3, of the Public Libraries Act, 1892. All the powers and duties of the corporation of Manchester as library authority had been delegated to that committee. Separate accounts were kept of the receipts and expenditure under the Public Libraries Act, 1892, of the corporation as the library authority and their officers, as required by s. 20, sub-s. 1, of that Act. The four buildings in question and the other public free libraries in the city of Manchester were maintained by a rate not exceeding the limit prescribed by s. 16 of the Manchester Corporation Act, 1891, as continued by s. 29 of the Public Libraries Act, 1892.

Each of the four buildings was used solely for the purposes of a public free library. No payment was made or demanded for any instruction there afforded by lectures or otherwise. Each of the buildings was by day in charge of a superintendent, and at night was unoccupied. None of the buildings was occupied by any officer of the corporation or of the library for which the same was used, nor by any person paying rent for the same or having any allowance in lieu of rent. No payment was made to the corporation as library authority by any person using any of the public free libraries, and no profit whatsoever was derived by the corporation therefrom.

The Reference Library in King Street was used exclusively as a place for the consultation and reading of books, and no books were lent out from the library. The Free Libraries in Every Street and Livesey Street were used as lending libraries and as places for reading of books and papers on the premises, and the Public Reading Room in Hyde Road was a place were books, magazines, &c., were read or consulted, but not lent out.

The Income Tax Commissioners considered that the case was

not distinguishable from the case of *Andrews* v. *Mayor, &c., of Bristol* (1), and that none of the four buildings in question was a building the property of a literary or scientific institution within the meaning of s. 61, No. VI., of the Income Tax Act, 1842, and that the appellants were not entitled to the allowances claimed by them. They therefore confirmed the assessments, subject to the case.

The Divisional Court affirmed the decision of the Commissioners. (2)

Jan. 31. *J. Lawson Walton, Q.C.*, and *G. P. Macdonell*, for the appellants. The corporation have a separate capacity as library authority under the Public Libraries Act, 1892, and in that capacity they have all the characteristics of a literary institution within the meaning of the Income Tax Act, 1842, s. 61, No. VI. The purposes for which the library authority is constituted and the buildings are used are clearly those of a literary institution. The appropriation of property to those purposes under the Act is irrevocable. Such property is vested in the urban authority as library authority, and they cannot thenceforward apply it to any other purpose. Under s. 18 of the

(1) 61 L. J. (Q.B.) 715.

(2) No. VI., contained in s. 61 of 5 & 6 Vict. c. 35, specifies "allowances to be made in respect of the said duties in Schedule A," which allowances are (inter alia) as follows: "For the duties charged on any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall and the gardens . . . .; or on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school or almshouse and offices belonging thereto and of the gardens . . . .; or on any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same."

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Public Libraries Act, 1892, the library authority may levy a rate which is entirely distinct from the rates which they levy as an urban authority. In rural parishes, a separate body of commissioners are appointed as the library authority. Buildings belonging to them would, it is contended, be the property of a literary institution within the meaning of the exemption. It cannot be that, because in urban districts the legislature availed themselves of the existing urban authorities as convenient bodies to be trustees and managers of these libraries, they are to be deprived of the exemption which similar libraries in rural districts are to enjoy.

Secondly, the words "property of any literary or scientific institution" in the Income Tax Act, 1842, s. 61, No. VI., are not to be construed as importing ownership in the strict legal sense of the term. The reasonable construction of them is that they mean property appropriated to an institution having literary or scientific objects; in the same way as property devoted to charitable objects is popularly spoken of as the property of a charity. In this view of the words it is immaterial to consider whether the owners of the legal estate can properly be said to be a literary institution.

[They cited *Bradford Library Society* v. *Churchwardens of Bradford* (1); *Andrews* v. *Mayor, &c., of Bristol.* (2)]

Sir *R. T. Reid, A.-G.*, and *Danckwerts*, for the Crown. It is not to be assumed that there is any distinction for this purpose between an urban and a rural library authority. Neither of them is a literary institution within the meaning of the exemption. The words "library authority" are used in the Act of 1892 as a convenient expression for compendiously designating the different bodies charged with the execution of the Act in urban and rural districts. They do not indicate that the library authority in an urban district has a separate corporate capacity as such. By conferring new functions on an existing body, a new body is not created: see *Andrews* v. *Mayor, &c., of Ryde* (3); *Great Western Ry. Co.* v. *Commissioners of Inland Revenue.* (4) The Act simply imposes fresh functions on the old urban autho-

(1) 1 E. & E. 88.
(2) 61 L. J. (Q.B.) 715.
(3) Law Rep. 9 Ex. 302.
(4) [1894] 1 Q. B. 507.

rity. Buildings which are vested in a municipal corporation for the purposes of the Public Libraries Act cannot properly be called the property of a literary institution. The corporation are not a literary institution. They are really trustees for the ratepayers who have voted for the establishment and maintenance of a public library out of the rates. Sect. 11 of the Public Libraries Act, 1892, enacts that the library authority may provide all or any of the following institutions, namely, public libraries, &c. It is hardly consistent with the language of the section to treat them as themselves a literary institution. The object of the exemption in the Income Tax Act, 1842, s. 61, No. VI., was to relieve the institutions described themselves, not to relieve such a body as the ratepayers of a borough which has set up a public library. The test is whether the body which uses the building is a literary or scientific institution. The literary and scientific institutions intended to be exempted are foundations ejusdem generis with the colleges, halls, hospitals, public schools, and almshouses which are mentioned in the previous part of the rule.

[They also cited *Pedder* v. *Mayor, &c., of Preston* (1); *Blake* v. *Mayor, &c., of London* (2); *Sulley* v. *Royal College of Surgeons of Edinburgh.* (3)]

J. Lawson Walton, Q.C., in reply.

Cur. adv. vult.

March 8. LINDLEY L.J. This is an appeal from the judgment of the Divisional Court holding that the buildings mentioned in the case, which are known as the Manchester Free Libraries, are not the property of a literary or scientific institution within the meaning of s. 61, No. VI., of the Income Tax Act, 1842, and that the appellants are therefore not entitled to the exemption claimed by them.

The buildings in question are used for the purposes of public libraries established under the Public Libraries Acts. The appellants are the urban authority for the city of Manchester, and are therefore the library authority in whom the buildings

(1) 12 C. B. (N.S.) 535.
(2) 19 Q. B. D. 79.
(3) 19 Court Sess. Cas. 4th Series, 751.

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are vested under the Public Libraries Act, 1892. The question is whether, under those circumstances, the buildings are the property of a literary or scientific institution within the meaning of the Income Tax Act, 1842. The Income Tax Commissioners considered that they were not, and the Divisional Court took the same view, following the decision in the previous case of *Andrews* v. *Mayor, &c., of Bristol.* (1)

I cannot think that a municipal corporation or body of ratepayers who, by adopting the Public Libraries Act, have become liable to be rated in order to maintain a free library is a literary institution within the meaning of that phrase in s. 61, No. VI., of the Income Tax Act, 1842. By literary or scientific institutions were meant such as were known to exist in 1842, and such others like them as might come into existence thereafter. But a literary or scientific institution supported by rates is not, in my opinion, such an institution as was contemplated by the legislature. The object of exempting literary and scientific institutions from income tax was to encourage private landowners to give land or allow it to be used by literary or scientific institutions supported by voluntary gifts or subscriptions, and so to encourage such institutions. Even if the library authority in this case were a distinct corporation, which it clearly is not (see *Andrews* v. *Mayor, &c., of Ryde* (2)), I should still be of opinion that, being supported by rates, it was not a literary institution within the meaning of those words in the Income Tax Acts. It follows that, in my opinion, a library authority in a rural district is not such an institution. But, even if a distinction material for the present purpose can be drawn between an urban library authority and a rural library authority, still to call the corporation of Manchester, even in its character of library authority, a literary institution is to misapply that expression, and to extend the exemption to a class of cases to which it was never intended to apply. The appeal must be dismissed with costs.

RIGBY L.J. I am of the same opinion. The question raised is whether the appellants, as the owners of certain free libraries,

(1) 61 L. J. (Q.B.) 715. (2) Law Rep. 9 Ex. 302.

are exempted from income tax in respect of those libraries under Schedule A. It is contended by the appellants that they are within the exemption contained in s. 61, No. VI., in respect of buildings that are the "property of any literary or scientific institution." I should have been glad if these libraries could have been brought within that exemption, because I think that, if the attention of the legislature had been called to their case, it is not unlikely that they would have extended this exemption to them. But we have to deal with the language of the Income Tax Act which was passed in 1842. At that time there was no such legislation as that contained in the Public Libraries Act, 1850, and the subsequent Acts, the provisions of which are now consolidated in the Public Libraries Act, 1892. In 1842 this particular kind of institution was not in existence. There is no doubt that free libraries are themselves literary institutions within the meaning of the Public Libraries Act, 1892; but the terms of the exemption granted by the Income Tax Act, 1842, have relation, not merely to the purpose to which the building is applied, but also to the position and character of the owners of the building. If it be right to say that the municipal corporation are the owners of these buildings within the meaning of this exemption in the Income Tax Act, then, on the most benevolent construction of the Act, I cannot see how a municipal corporation, who have cast upon them, as part of the scheme of local government, the management of these free libraries, can be called a literary or scientific institution within the meaning of the Act. The words creating the exemption are "any building the property of any literary or scientific institution," and we have therefore to consider not merely the character of the building itself, and the purposes for which it is used, but also the position and character of the owners of the building as distinct from the building itself. Assuming that the municipal corporation are to be deemed the owners of these libraries for this purpose, I am unable to see how the corporation of Manchester can be said to be a literary or scientific institution, because, as part of their functions as the urban authority, and therefore the library authority, they have to bring into existence and manage things which may, under the Public Libraries Act, properly be called literary

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institutions. I have also considered the case with reference to rural authorities. In the case of rural districts, certain commissioners are incorporated for the purpose of being library authorities; but they have no literary or scientific character in themselves, and are merely the agents of the ratepayers for the purpose of bringing into existence and managing free libraries. It appears to me, therefore, that they too cannot be brought within the exemption given by No. VI.

LORD ESHER M.R. I am bold enough to differ from the conclusion at which my learned brothers and the Divisional Court have arrived. It appears to me that what we have to do in order to determine this question is not so much to construe the words of the Income Tax Act, which are plain enough, as to consider the provisions of the Public Libraries Act, 1892, in order to see what status is given by that Act to libraries established under its provisions and to those who are concerned with such libraries.

These assessments appear to have been made upon the corporation of Manchester in their general capacity as a municipal corporation, payable out of the general rates, on the ground that as such corporation they are the owners of these buildings. In the first place, I think that in their capacity as a municipal corporation they are not the owners of these buildings, and cannot be made subject to the tax. The corporation of Manchester having resolved to devote these buildings to the purposes of free libraries, they would have had nothing more to do with them, but for the fact that, being within an urban district, for which the corporation were the urban authority, they were vested in the corporation as being such authority. By s. 4 of the Public Libraries Act, 1892, when the Act has been adopted by a vote of the voters for the district, it is to be carried into execution, if the district is an urban district, by the urban authority, and any such authority is referred to in the Act as the library authority. Therefore it is with the appellants as urban authority, and therefore library authority, not as municipal corporation, that we have to deal. By s. 11 of the Act "the library authority of any library district for which this Act has been

adopted may, subject to the provisions of this Act, provide all or any of the following institutions, namely, public libraries," &c. Therefore a public library is declared by the Act to be an "institution," which is the very same word as is used in the Income Tax Act. I cannot see, if it is to be considered to be an institution for the purposes of the one Act, why it should not also be considered to be an institution for the purposes of the other. The section then provides that, for the purpose of such an institution, the library authority may purchase and hire land, and by a subsequent section it is provided that they may accept gifts of land. By s. 12, sub-s. 2, "the library authority of any library district which is an urban district may with the sanction of the Local Government Board appropriate for the purposes of this Act any land which is vested in that authority"; and by sub-s. 3 "a library authority may with the sanction of the Local Government Board sell any land vested in them for the purposes of this Act" and apply the proceeds of the sale as mentioned in the sub-section. All these things are to be done by the library authority in their capacity as such, and not in any other capacity. By s. 14 "all land appropriated, purchased, or rented, and all other real and personal property presented to or purchased or acquired for any library, &c., shall be vested in the library authority." So that these lands, when they had been appropriated by the corporation of Manchester to the purposes of free libraries, became vested in them as the library authority. What, then, is the position of the library authority with regard to such land? It is vested in them as library authority; in their capacity as a municipal corporation they can never receive any benefit from it or intermeddle with it in any way: they are obliged to deal with it solely for the purposes of a library. The legal estate is vested in them, but they hold it merely as trustees. They are bound to manage and use the buildings as library authority for the benefit of the people who are to use the library. I agree that the municipal corporation of Manchester cannot in its general capacity be called a literary institution. But a public library appears to me to be an institution, and it is expressly so called by the Act of 1892. If an institution, what is it but a literary institution? It is an

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institution the object of which is to diffuse literary information among the people. What does such an institution consist of? There must be trustees who hold the legal estate for the purposes of the institution; there must be managers, who in this case happen to be the same body as the trustees; and then there are the people who are to be benefited by the institution. The property which in law is vested in the trustees of such an institution seems to me to be in reality the property of the institution itself. The institution is for this purpose the beneficial owner. Under these circumstances the libraries in question appear to me to come exactly within the words of the Income Tax Act, 1842, s. 61, No. VI. They are buildings the property of an institution such as I have described, which appears to me to be a literary institution, and they are used solely for the purposes of that institution, no payment being made or demanded for any instruction there afforded by lectures or otherwise.

Those who framed the Act of 1892 must, I think, be taken to have had the language of the Act of 1842 present to their minds; and we find that in providing for such libraries they call them by the very name used in conferring the exemption under the former Act, from which I think it may be inferred that they intended them to have the benefit of that exemption. For these reasons I think these libraries ought to be held to be exempt from income tax, and this appeal should be allowed.

Appeal dismissed.

Solicitors for appellants: *Austin & Austin, for the Town Clerk of Manchester.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

E. L.

Distinguished. BASMA *v.* WEEKES. [1950] 2 All E.R. 146.

[illegible]
Referred to. BASMA *v.* WEEKES [1950] A. C. 441

[IN THE COURT OF APPEAL.]

C. A.
1895
March 13.

LUMLEY *v.* RAVENSCROFT.

Landlord and Tenant—Agreement for Lease by Two Defendants—One of Defendants an Infant—Specific Performance—Injunction.

The defendants, an infant and his sister, agreed by their agent to grant the plaintiff a lease of premises in which they were jointly interested. The plaintiff brought an action for specific performance of the agreement, and applied for an injunction to restrain the defendants till after the trial of the action from leasing the premises to any other person:—

Held, that an injunction ought to be granted only where a case was made out for specific performance; that one of the defendants being an infant the plaintiff was not entitled to specific performance against both of them; nor against the sister as to her interest in the absence of any proof of misrepresentation or misconduct on her part; and that he was therefore not entitled to an injunction.

THIS was an appeal from an order of Day J. in chambers.

The plaintiff, Henry Lumley, brought an action in the Queen's Bench Division against Charles Ravenscroft and his sister Alice Maud Ravenscroft for (1.) specific performance of a contract in writing, made on October 5, 1894, between the plaintiff and the defendants by their agent for a lease to the plaintiff of the ground-floor of 34, St. James's Street; or (2.), in the alternative, damages; (3.) an injunction restraining the defendants until after the trial of the action from leasing the premises to any other person than the plaintiff; and he took out a summons for an injunction in the terms of the writ.

At the hearing of the summons it appeared by two letters of October 5, 1894, that one Moore, as agent on behalf of the defendants, agreed to grant a lease of the premises to the plaintiff, and that the defendant Charles Ravenscroft was an infant aged nineteen. The learned judge granted an interlocutory injunction against the defendant Alice Maud Ravenscroft. She appealed.

Younger, for the appellant. An interlocutory injunction is ancillary only to the relief which the Court may grant at the trial. The plaintiff, therefore, is not entitled to an injunction unless he can make out a case for specific performance. There

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is no question of specific performance against the infant, and where a person entitled to a share only of an estate enters into a contract with respect to the entirety specific performance will not be granted against such person in respect of his share—at any rate, in the absence of misrepresentation or improper conduct—because that is not the contract which the parties contemplated: *Price* v. *Griffith* (1); *Thomas* v. *Dering*. (2) Here there has been no misrepresentation by the appellant as to her interest. Again, an injunction ought not to be granted in this case unless the appellant is in a position to compel the plaintiff to accept such interest as she has; but the plaintiff makes no offer to give any undertaking to accept such interest. The plaintiff's remedy, if any, is by way of damages.

Lush Wilson, for the respondent, the plaintiff. The conduct of the defendants brings this case within the exceptions stated in the cases above cited.

Younger replied.

LINDLEY L.J. This is an appeal from an order made by Day J., granting an injunction against one of the two defendants in the action, Alice Ravenscroft, restraining her from granting a lease of certain property in St. James's Street to any other person than the plaintiff until after the trial of the action. The case is a singular one. There is what on the face of it appears to be a valid binding agreement for the lease of these premises to the plaintiff, signed by the plaintiff and by Moore, as agent for the defendants. The contract is contained in two letters of October 5, 1894. If Moore's principals were both of age, there would be a complete contract and no difficulty in the case. But unfortunately one of the principals is an infant nineteen years of age, and the agreement is unquestionably an agreement for a lease by the two. It is an agreement by the two with the plaintiff for a lease to him of certain property, of which, as it appears, a lease was being granted to the two. What is the law? Specific performance is out of the question. You cannot get specific performance against an infant; and upon the evidence before us no case is made out for specific performance against the other

(1) 1 D. M. & G. 80. (2) 1 Keen, 729, 744.

defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Griffith* (1) and *Thomas* v. *Dering* (2), but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages. As to that I say nothing. But if it would be wrong to grant specific performance, it follows that it would be wrong to grant an injunction. The appeal must succeed, and the order of Day J. must be discharged; but the costs here and below will be costs in the action.

A. L. SMITH L.J. On the facts before us I am of opinion that a case for specific performance has not been made out against the two defendants or against either of them. That being so, the injunction fails.

Appeal allowed.

Solicitors for appellant: *Proudfoot & Chaplin.*
Solicitors for respondent: *Longbourne, Stevens & Co.*

H. C. J.

SELF *v.* HOVE COMMISSIONERS.

1895 *Jan.* 25.

Local Government—Local Authority—Drain—Single Drain connecting different Houses with Public Sewer—Liability to Repair—Effect of Notice by Local Authority to Owner to Repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

By s. 41 of the Public Health Act, 1875, a local authority, on the application of any person stating that a drain on premises within their district is a nuisance or injurious to health, may, if upon examination such drain appear to be in a bad condition or to require alteration or amendment, give notice in writing to the owner or occupier of the premises requiring him to do the necessary works; and, if such notice be not complied with, the local authority may themselves do the work and recover the expenses from the owner.

By s. 19 of the Public Health Acts Amendment Act, 1890 (which may be adopted by local authorities), where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an

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(1) 1 D. M. & G. 80. (2) 1 Keen, 729, 744.

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application may be made under s. 41 of the Public Health Act, 1875, and the local authority may recover any expenses incurred by them under the powers conferred by that section from the owners of the houses; and, for the purpose of s. 19, "drain" includes a drain used for the drainage of more than one building.

Two houses belonging to different owners were connected with a public sewer by a single private drain. The local authority of the district, who had adopted the Act of 1890, served upon one of the owners a notice, under the Public Health Act, 1875, addressed to both, requiring them to abate a nuisance arising from the drain by doing certain works, and stating that, unless the nuisance were abated, the local authority would proceed to enforce the abatement and to recover costs and penalties. The owner upon whom such notice was served accordingly did the work, and brought an action against the local authority to recover the cost as money paid by her at their request:—

Held, that the notice given by the defendants to the plaintiff was not a request to do the work which would support the action; that no such request could be implied, because the defendants were not themselves compellable to do the work, and under ss. 41 of the Act of 1875 and 19 of the Act of 1890 could have compelled the owners to do it, and therefore that the defendants were not liable.

APPEAL from a decision of the judge of the Brighton County Court.

The following facts appeared from the judge's notes:—

The plaintiff was the owner of a semi-detached house in Hove, adjoining which was another house belonging to a different owner. The defendants were the urban sanitary authority of the district. In May, 1894, the defendants' sanitary inspector served a notice upon the plaintiff under the provisions of the Public Health Act, 1875. The notice was addressed to the owners of both houses, and stated that the inspector had found a nuisance existing upon the premises, namely, "a main drain defective so as to be a nuisance or injurious to health," and requiring the owners to remedy the same as therein specified, and stating that unless the nuisance was abated the defendants would forthwith proceed, as required by the Public Health Act, 1875, to enforce the abatement of the said nuisance and the prevention of the repetition thereof, and to recover from the owners such costs and penalties as they might have incurred. The drain in question was a single private drain connecting the plaintiff's house and the adjoining house with the common sewer situate in an adjacent street. The plaintiff repaired the drain at a cost of about 26*l.*,

and sued the defendants to recover that amount as money paid at their request.

The defendants had adopted Part III., containing s. 19, of the Public Health Acts Amendment Act, 1890. (1)

The learned county court judge gave judgment for the plaintiff upon the ground that the notice given by the defendants was an

(1) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19:—

"(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.

"(2.) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly.

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

By ss. 2 and 3 a local authority may adopt (inter alia) Part III. of the Act, which includes s. 19.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41:—

"On the written application of any person to a local authority, stating that any drain water-closet earth-closet privy ashpit or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain water-closet earth-closet privy ashpit or cesspool. If the drain water-closet earth-closet privy ashpit or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain water-closet earth-closet privy ashpit or cesspool on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and, if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

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express request to do the work, which they were liable to do themselves.

The defendants appealed.

Boxall, for the appellants. The work was not done at the request of the defendants. The notice was not a request at all, but a demand upon the plaintiff as being legally liable to do the work. The defendants were not liable to do it, because they had adopted s. 19 of the Public Health Act, 1890, and could, therefore, have compelled the plaintiff to do it by proceedings under s. 41 of the Public Health Act, 1875. There was no implied request because the plaintiff was not compelled to do anything which the defendants were compellable to do. [He referred to *Moule* v. *Garrett*. (1)]

Channell, Q.C., and *C. C. S. Fooks*, for the respondent. The case of *Travis* v. *Uttley* (2) shews that the defendants themselves were liable to do the work, and that the plaintiff could not be compelled to do it. In that case s. 19 of the Public Health Act, 1890, was referred to.

[*Macmorran* and *R. C. Glen*, as amici curiæ, stated that when the case of *Travis* v. *Uttley* (2) was decided the corporation of Halifax had not adopted Part III. of the Act of 1890. (3)]

The drain was a "sewer" repairable by the defendants at their own expense. The plaintiff did not do the work as a volunteer, but in consequence of the notice given by the defendants.

Boxall was not heard in reply.

WILLS J. The judgment of the learned county court judge cannot be supported. The ground of his decision seems to have been that the notice which was served upon the plaintiff by the local authority was an express request to do the work. That is a complete fallacy; it was not a request at all, but was a notice

(1) Law Rep. 5 Ex. 132.

(2) [1894] 1 Q. B. 233.

(3) It has been ascertained that the learned counsel were mistaken, inasmuch as Part III. of the Public Health Acts Amendment Act, 1890, was adopted by the corporation of Halifax in 1891. It will be seen, however, that s. 19 did not apply to the facts in *Travis* v. *Uttley* ([1894] 1 Q. B. 233), for in that case the houses under which the drain ran belonged to one person and not to different owners.

that the local authority required the work to be done as a matter of right, and that legal proceedings would be taken if the work was not done. Then it is said that the defendants were themselves liable to do the work, which the plaintiff has done though she was under no liability to do it, and that, therefore, a request must be implied, and the defendants are liable, on that ground, to repay the cost. Now, the local authority is legally bound to have an effective sewerage system; but there is nothing in the Act which says that they are under any obligation to do any particular work. Actions have been brought against local authorities to compel them to do particular work, but, I think, without success. We may, however, take higher ground than that. I cannot help thinking that, by virtue of s. 19 of the Public Health Act, 1890, the liability to do this work was upon the plaintiff. That section provides that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain an application may be made under s. 41 of the Public Health Act, 1875, and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses." Sect. 19 applies here because the local authority have adopted it. Under those circumstances the defendants would have been entitled to give notice under s. 41 of the Public Health Act, 1875, and to compel the plaintiff to do what she has done. If that be so, the whole foundation of the plaintiff's contention is gone. I think that that is the effect of s. 19 of the Act of 1890. *Travis* v. *Uttley* (1) seems to me distinguishable from any point of view. If what we are told to-day by the learned counsel on both sides in that case be correct, it clearly has no application, but it is also distinguishable on other grounds. The defendants, therefore, cannot be liable in this action, because the real liability was upon the plaintiff. If that were not so, a nice point might arise whether the plaintiff could recover. If the local authority had actually taken proceedings against the plaintiff and she had submitted, I think that it is clear the plaintiff could not afterwards recover the cost of doing the work, on the ground that the

(1) [1894] 1 Q. B. 233.

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liability really lay upon the local authority. Where there is a mere threat of legal proceedings, acquiesced in by the parties threatened, without any legal proceedings, I am not sure whether the same doctrine would apply. There are no authorities upon that point. If there were anything like oppression, I think that the action would lie; but there was nothing of that kind in this case. It is my impression that no action would lie in such a case, although no legal proceedings were taken. The decision of the learned county court judge was wrong, and the appeal must be allowed.

WRIGHT J. I am of the same opinion. I wish only to expand one point in the judgment of my brother Wills. It is a mistake to suppose that the defendants were under any liability to do this work. Their liability is, under s. 15 of the Public Health Act, 1875, to repair existing sewers generally, and generally to sewer their district. They could have performed that duty in this case by ordering the plaintiff and the owner of the adjoining house to provide a separate drain running into the public sewer for each house. Instead of doing that, they ordered the plaintiff to repair the existing drain. There is, therefore, no ground for saying that the liability was on the defendants to do the work. For myself, I should like to see the case of *Travis* v. *Uttley* (1) considered in the Court of Appeal. I think that local authorities may get out of the difficulties created by that decision by compelling people to make separate drains, or by adopting s. 19 of the Public Health Act, 1890, and giving written notices under s. 41 of the Public Health Act, 1875.

Appeal allowed.

Solicitor for appellants: *Harwood, for C. A. Woolley, Brighton.*
Solicitors for respondent: *Stokes, Saunders, & Stokes.*

(1) [1894] 1 Q. B. 233.

W. A.

BARNETT, Appellant; HICKMOTT, Respondent.

1895
Jan. 24;
Feb. 8.

Parliament—Borough Vote—Part of a House separately occupied as a Dwelling—Exclusive Occupation of Cubicle in Dormitory—41 & 42 *Vict. c.* 26, *s.* 5.

A policeman had the exclusive occupation, by virtue of his service, of a cubicle in a dormitory at a police barrack. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by a partition seven feet high, but there was a space of five feet between the top of the partition and the ceiling. The policeman kept the key of his cubicle, and was entitled to lock it up at any time:—

Held, that the cubicle was not "part of a house separately occupied as a dwelling" within the meaning of 41 & 42 Vict. c. 26, s. 5, and that the policeman was not entitled to the franchise in respect of it.

Stribling v. *Halse* (16 Q. B. D. 246) commented on.

Case stated by the revising barrister for the borough of Reading.

The facts as set out in the case were as follows:—

"The appellant occupied during the qualifying period a cubicle in the police station, London Street, Reading, by virtue of his service. In this cubicle is his bed and other furniture.

The room in which this cubicle is contains twelve similar cubicles, each of which is occupied by a police-constable. Each cubicle is about twelve feet by eight feet, and on three sides is inclosed by a wooden partition about seven feet high. The fourth side is an outside wall of the building, and has a window in it. Each cubicle has a door entering into a passage, which passes down the main room, and that door has a lock. Each man is entitled to lock up his cubicle at any time. From the top of the partition to the ceiling of the room is about five feet.

The passage, the ventilation, and the atmosphere of the dormitory are common to all the cubicles.

It was assumed that 'the dwelling-house' was not inhabited by any person under whom the appellant served in his office, service, or employment, and the question was argued by both sides on this assumption. It was not proved or suggested that any one of the cubicles in the dormitory was occupied by any superior officer.

It was contended on behalf of the objector, that notwith-

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standing the possession of a key by the appellant, and the right to lock up his cubicle, the cubicle was not so separated from the rest of the dormitory as to make it 'a part of a house separately occupied as a dwelling' within the meaning of 41 & 42 Vict. c. 26, s. 5, but that the dormitory was jointly occupied by the holders of the twelve cubicles.

It was contended, on behalf of the appellant, that the cubicle was sufficiently separated to be 'a part of a house separately occupied as a dwelling.'

I decided, and if and so far as the question is one of fact for me, I find, that the cubicle is not sufficiently separated from the rest of the dormitory to be 'part of a house separately occupied as a dwelling,' and I expunged the name of the appellant from the list."

Germaine, for the appellant. The case is really concluded by *Stribling* v. *Halse*. (1) It was there held that the occupation of a furnished bedroom in a house was sufficient inhabitancy of a dwelling-house, and it can make no difference that the walls of such a bedroom are not carried quite up to the ceiling. These cubicles were rooms in themselves, as is shewn by there being a door and a key to each. They were not divisions of a room, as might be the case if the partition consisted of a line drawn round each bed. The cubicle was the appellant's dwelling-house, since it was the place where he slept (*Powell* v. *Guest* (2)), and it was, within the definition of 41 & 42 Vict. c. 26, s. 5, "part of a house separately occupied as a dwelling."

Scrutton, for the respondent. The first question is whether the cubicle was sufficiently a separate part of a house to entitle the appellant to the franchise. That question is untouched by *Stribling* v. *Halse* (1), where there was no question of the physical separation of the bedrooms. It is a question of fact in each case, and the revising barrister has found it as a fact against the appellant. There are three necessary ingredients for this franchise—tenement, occupation, and estate. The tenement must be at least part of a house, the occupation must be separate, and the estate must be as owner or tenant. The Representation of the

(1) 16 Q. B. D. 246. (2) 18 C. B. (N.S.) 72.

People Act, 1884 (48 & 49 Vict. c. 3), by s. 3 says that certain persons—who would include the appellant—shall be deemed to occupy as tenants. That gets rid of the question of estate. But the question of tenement remains. The part of a house must be a separate part of a house—a tenement, in fact, which is capable of being separately rated. Before the 41 & 42 Vict. c. 26, s. 5, there were great judicial differences on the question of structural severance: *Cook* v. *Humber* (1); *Thompson* v. *Ward* (2); *Boon* v. *Howard* (3); but by that enactment the word "separate" was transferred from the dwelling to the occupation. There must, however, still be a part of a house which is capable of separate occupation: *Bradley* v. *Baylis* (4); and this was recognised by s. 18 and Sched. II. to the Registration Act, 1885 (48 & 49 Vict. c. 15). The second question is whether, assuming the cubicle to be part of a house, it is separately occupied as a dwelling-house within the meaning of 41 & 42 Vict. c. 26, s. 5. This point *Stribling* v. *Halse* (5) decides in favour of the appellants; but on the authority of a supposed decision of the Court of Appeal, which is not reported and cannot be found, and which, according to Lord Coleridge C.J. (6), removed the doubt expressed by the present Master of the Rolls in *Bradley* v. *Baylis* (4), whether a person could be said to separately occupy a bedroom as a dwelling-house when he dwelt partly in it and partly in a sitting-room, and did not dwell in one exclusively.

Germaine, replied.

Cur. adv. vult.

Feb. 8. The following judgment was read by

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the revising barrister for the borough of Reading, who expunged the appellant's name from the list of parliamentary voters on the ground that he had not occupied during the qualifying period "a part of a house separately occupied as a dwelling" within the meaning of s. 5 of 41 & 42 Vict. c. 26. [His Lordship then stated the facts above set out, and continued:—]

(1) 11 C. B. (N.S.) 33.
(2) Law Rep. 6 C. P. 327.
(3) Law Rep. 9 C. P. 277.
(4) 8 Q. B. D. 195.
(5) 16 Q. B. D. 246.
(6) See 16 Q. B. D. at p. 250.

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Lord Russell C.J.

It will be observed that it is not stated how these cubicles were warmed or how they were lighted at night—whether or not there was separate lighting and warming for each; nor is it stated whether or not there was or were some other room or rooms in the police-station shared in common for the purposes of meals, for the purposes of recreation, or for other purposes. Upon the facts stated, the question we have to decide is simply this—whether the revising barrister was wrong in holding that the appellant's cubicle is not "a part of a house separately occupied as a dwelling" within the meaning of s. 5 of 41 & 42 Vict. c. 26, the franchise claimed being the joint result of that Act and 30 & 31 Vict. c. 102, s. 3, sub-s. 2, and 48 & 49 Vict. c. 3, s. 3? In my opinion, the appellant was occupying a part of a room in a house, but such part of a room was not separately occupied by him as a dwelling.

The ventilation and atmosphere of the dormitory are stated in the case to be common to all the cubicles, and the window of each cubicle necessarily helps the natural lighting of the adjoining cubicle or cubicles. These are, it appears to me, matters essential to consider when the question is whether each cubicle can be regarded as part of a house capable of being separately occupied as a dwelling. As I have stated, we are not informed whether there are any and what arrangements for the artificial lighting and heating of the room in which these cubicles are situate; but, even assuming (against probabilities) that each cubicle had a separate arrangement for warming and lighting, it follows from the fact that the cubicles were open at the top that each of the occupants would to some extent share the warmth and light of the dormitory as a whole.

Again, the arrangement of the cubicles precludes the idea of that complete or secure privacy implied in the separate occupation of a dwelling, and is probably adopted partly with a view to supervision and the maintenance of discipline generally in the room.

It seems to me, therefore, that these men sharing, as they do, so many things in the occupation of these cubicles, cannot be said to be separately occupying them as dwellings. It was argued on behalf of the appellant that this case was concluded

by the case of *Stribling* v. *Halse*. (1) I cannot assent to that view, while recognising that we ought to be bound by that case so far as it extends. In that case each shop-assistant had a separate furnished bedroom, structurally completely separate as a room, and no one person in his occupation of his particular bedroom shared light, air, warmth, or ventilation with any other room. I have, therefore, come to the conclusion that the revising barrister was right in the view he took. The appeal will, therefore, be dismissed with costs. I wish to add that this judgment can have no general application; it is confined to the special facts of this case.

As to *Stribling* v. *Halse* (1), I wish to say a word. It is stated in the judgment in *Stribling* v. *Halse* (2) that a doubt, which had been expressed by the present Master of the Rolls (when Lord Justice), was removed by a decision of the Court of Appeal; but there is no reported case to this effect, and a rigorous search (made at my instance) has failed to discover any record of such a case. The doubt there referred to was whether a person could be said to occupy a bedroom separately as a dwelling-house where he dwelt partly in the bedroom and partly in other rooms. I share this doubt, especially in a case in which other rooms for recreation, for meals, and other purposes are shared in common. I should not here have referred to this case but for the facts, firstly, that the case which is said to have removed the doubt cannot be found; and secondly, because in the Irish case of *Hasson* v. *Chambers* (3) two of the five learned judges in the Court of Appeal expressly dissented from *Stribling* v. *Halse* (1), and the majority, while acquiescing in it, can hardly be said to have approved of it. Nor, in my opinion, is the doubt referred to removed by the 5th section of the 41 & 42 Vict. c. 26.

WILLS J. I have read and considered the judgment which has just been delivered by my Lord, and I entirely concur in it. The case of *Stribling* v. *Halse* (1) has, I think, gone to the extreme length to which such cases can be carried, and cannot be considered as governing any case which goes beyond the facts

(1) 16 Q. B. D. 246. (2) See 16 Q. B. D. at p. 250.
(3) 18 L. R. (Ireland), 68.

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of that case. It cannot, I think, be considered an altogether satisfactory decision after the Irish case of *Hasson* v. *Chambers*. (1)

WRIGHT J. I agree with the judgment which has been read by the Lord Chief Justice.

Appeal dismissed. Leave to appeal given.

Solicitors for appellant: *Torr, Gribble, Oddie, & Sinclair, for C. E. Hewett, Reading.*

Solicitors for respondent: *Rooke & Sons, for Brain & Brain, Reading.*

A. P. P. K.

C. A.

1895

March 1.

[IN THE COURT OF APPEAL.]

BURY *v.* THOMPSON.

Landlord and Tenant—Lease—Proviso to determine by Notice—Sufficiency of Notice.

The plaintiff sued for a declaration that the term of years created by a lease, under which he was tenant to the defendant, had been determined by notice.

The lease was for twenty-one years from Christmas, 1887, subject to a proviso "that if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term, and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year," the lease should determine.

On October 21, 1893, the plaintiff wrote to the defendant, "I see that my first seven years will be determined on December 25, 1894 . . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt."

Negotiations for a reduction of rent followed, and continued until within six months of the termination of the first seven years of the term, when the defendant refused any reduction:—

Held (affirming the judgment of the Divisional Court, ante, p. 231), that the letter of October 21, 1893, was a good notice to determine the term created by the lease.

APPEAL of the defendant from the decision of a Divisional Court (Pollock B. and Grantham J.). The case is reported ante, p. 231, where the facts are fully set out, and for the purposes of the present report the facts sufficiently appear from the head-note.

(1) 18 L. R. (Ireland), 68.

Alfred Lyttelton, for the defendant, argued as in the Court below, and cited the same authorities.

R. M. Bray, for the plaintiff, was not called upon to argue.

LORD ESHER M.R. It is impossible for us to reverse the decision of the Court below. The case clearly comes within the rule laid down by the majority of the Court of Appeal in *Ahearn* v. *Bellman*. (1) The meaning of the letter of October 21 is that the plaintiff will not stop unless the defendant does something for him—that something being a reduction of the rent. I think that the expression "I shall not be able to stop" means the same as "I shall not stop," and that there was a distinct intimation that he would not stop upon the terms of the existing lease. This amounted to a good notice to determine the lease, and the appeal must therefore be dismissed.

LOPES L.J. I am of the same opinion. A notice to quit is a good notice if it be so expressed that a person of ordinary capacity receiving the notice cannot well mistake its nature; it must be clear and unambiguous. This letter clearly conveyed to the defendant an intimation that it was not the plaintiff's desire to stay on beyond the seven years upon the terms of his existing lease; it seems to me impossible to say that it did not convey to a landlord of ordinary capacity notice of the plaintiff's desire not to continue the tenancy. The defendant's answer of October 23 clearly shews this, and shews him to have been clearly aware that what the plaintiff meant was that he wished to determine his tenancy in the way authorized by the lease.

RIGBY L.J. I concur. Accepting the rule that a notice to quit must be clear and certain in its terms and not ambiguous and not optional, I think this was a good notice by the tenant to determine his tenancy. No form of words is necessary to the validity of such a notice, and the question is whether this letter plainly gives notice of the plaintiff's desire to exercise his right of determining the lease. It gives a very excellent reason for his doing so, for it says that he is paying too high a rent and that he will not be able to stop on unless a reduction is made—

(1) 4 Ex. D. 201.

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BURY v. THOMPSON.

that is to say, unless the defendant gives him a better lease. Then it goes on to say, "I give you early intimation of this," which must mean of his desire to determine a disadvantageous lease. As to the decision of Lord Mansfield in *Doe* v. *Jackson* (1), I think that the true interpretation has been placed upon it by Bramwell and Cotton L.JJ. in *Ahearn* v. *Bellman*. (2)

Appeal dismissed.

Solicitor for plaintiff: *T. F. Adshead.*

Solicitors for defendant: *Gush, Phillips, Walters, & Williams.*

W. J. B.

1895

Jan. 31; *Feb.* 7.

O'SULLIVAN *v.* THOMAS.

*Gaming—Agreement by way of Wagering—Recovery of Deposit from Stakeholder—*8 *&* 9 *Vict. c.* 109*—Gaming Act,* 1892 (55 *&* 56 *Vict. c.* 9), *s.* 1.

The Gaming Act, 1892, s. 1, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum of money:—

Held, that money deposited by the plaintiff with the defendant as stakeholder to abide the result of a race between the plaintiff and a third party was not money paid under or in respect of a wagering contract within the meaning of the Gaming Act, 1892, and therefore that the plaintiff, having demanded his deposit back from the defendant before it had been paid over by him to the third party, was entitled to maintain an action against the defendant for its recovery.

APPEAL from the judge of the Aberdare County Court.

The plaintiff agreed with another man to run a race for 5*l.* a side, and each deposited 5*l.* with the defendant as stakeholder. The plaintiff lost the race, and, being dissatisfied with the result, demanded the return of his 5*l.* from the defendant before the latter had paid the stakes over to the winner. The defendant refused to return the 5*l.* to the plaintiff, and paid the whole 10*l.* over to the winner. The plaintiff thereupon brought this action to recover his deposit. The learned judge gave judgment for the plaintiff, but gave the defendant leave to appeal.

Jan. 31. *Montague Lush*, for the defendant. This is a wagering contract, and the plaintiff's right of action is taken away by

(1) 1 Doug. 175. (2) 4 Ex. D. 201.

the Gaming Act, 1892. It is conceded that before that Act an action lay against a stakeholder to recover back a sum of money deposited in his hands to abide the event of a wager, if the depositor demanded it back before it had been paid over by the stakeholder: *Hampden* v. *Walsh* (1); *Diggle* v. *Higgs* (2); although in the latter case Cockburn C.J. said that, had the matter been res integra, he should have thought that such an action would not lie. The Act of 1892, however, expressly avoids a promise to pay any person any sum of money paid by him under or in respect of a wagering contract; and the Act has received judicial interpretation in *Tatam* v. *Reeve* (3), where it was held to take away the right of action by an agent against his principal to recover money paid by the agent to persons with whom the principal had lost bets, although it did not clearly appear that the agent knew that the money was paid in respect of bets. In the present case the money deposited with the defendant was money paid by the plaintiff under or in respect of a wagering contract within the meaning of the section; it could only be recovered upon an implied promise by the defendant to repay it, and such a promise is expressly avoided by the Act.

[He also cited *Savage* v. *Madder* (4); *De Mattos* v. *Benjamin.* (5)]

William Evans, for the plaintiff. It is admitted that this is a wagering contract. But the Act of 1892 is levelled against persons who sue their principals for the recovery of money paid by them for their principals to third parties in respect of wagering contracts, and *Tatam* v. *Reeve* (3), which was an action by the agent against his principal to recover money paid away by the former, was clearly within the very words of the Act. In order to bring a case within the statute there must be an actual payment of money by the plaintiff in the ordinary sense of the term, and a mere revocable deposit is not a payment. The plaintiff's rights are therefore unaffected by the Act, and, as he had revoked the defendant's authority before actual payment over by him, he is entitled to recover his deposit within the

(1) 1 Q. B. D. 189.
(2) 2 Ex. D. 422.
(3) [1893] 1 Q. B. 44.
(4) 36 L. J. (Ex.) 178.
(5) 63 L. J. (Q.B.) 248.

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principle of the decisions in *Hampden* v. *Walsh* (1) and *Diggle* v. *Higgs*. (2)

Montague Lush, in reply.

Cur. adv. vult.

Feb. 7. WILLS J. I am of opinion that this appeal should be dismissed. The question depends entirely on s. 1 of the Gaming Act, 1892, which avoids any promise to pay any person any sum of money paid by him under or in respect of a wagering contract. The sole question for our determination is whether the money deposited by the plaintiff, to abide the result of the bet and to be paid over to the winner, comes within the expression in the Act "sum of money paid," and can be said to be a sum of money paid by the plaintiff; if it does, no action will lie for its recovery; if it does not, an action is maintainable. In my opinion, an action will lie; we must give to the word "paid" its primâ facie meaning of paid out and out; I do not think that it is properly applicable to money deposited for the purpose of paying a third party. The case admits of very little argument or discussion, and must depend on our impression as to the meaning of the language used in the section. I am not sorry to be able to come to the conclusion at which we have arrived; an opposite construction would make the Act of Parliament, which certainly was not passed out of sympathy with the betting fraternity, their charter. It has been held in *De Mattos* v. *Benjamin* (3) that a person holding money with express directions to pay it over to the winner of a bet cannot keep it as against the latter, and if a person who has made a bet and deposited the money with a stakeholder cannot recover it back from him before payment over, there would be a complete chain of legal liability, which would make a bet absolutely irrevocable whenever the money had been deposited with a third party. If the Act of Parliament required me so to hold, I should not hesitate to do so; but I feel on safe ground in saying that the Act was not conceived with the view of affording legal facilities to betting men to enable them to carry out their betting operations by the aid of the Courts of Law.

(1) 1 Q. B. D. 189. (2) 2 Ex. D. 422. (3) 63 L. J. (Q.B.) 248.

WRIGHT J. read the following written judgment. At the time when the Act of 1892 was passed such a wagering contract as was made in this case was not what is called illegal. It was void in the sense that no action could be maintained in which the cause of action was that contract, and of course an authority given by one of the parties to his agent to pay money to the other party could be revoked before payment. But if (1.) the agent had received the money from his principal and had not paid it over; or (2.) if he had received it for his principal from the other party; or (3.) if he had at the request of his principal paid money to the other party in respect of the wager, there was in each of these three cases a cause of action, against the agent in the first two cases and by the agent in the third case, independently of the void contract itself. The question is, how far the Act of 1892 has affected the right of action in one of these three cases. It clearly takes away the agent's right of action in the third case, if the agent has paid the money with notice or knowledge of the purpose, and perhaps, according to *Tatam* v. *Reeve* (1), even in the absence of such notice or knowledge. It equally clearly does not take away the principal's right of action in the second case, because, whatever the intention of the framers of the Act may have been, the words "money paid by him" cannot be construed as including money received for him. And I think that it does not take away the principal's right of action in the first case. The expression "money paid by him" does not appear properly to apply to a revocable deposit. And it seems difficult wholly to disregard the consideration that a different construction would tend directly and almost necessarily to defeat the very object of the Act, by preventing a revocation of the deposit, and so giving to the winner of the wager a practical certainty of being paid his bet, which advantage he did not previously possess.

Appeal dismissed.
Leave given to appeal.

Solicitors for plaintiff: *Purkis & Co., for Phillips & Son, Aberdare.*
Solicitors for defendant: *Bell, Brodrick, & Gray, for Linton & Kenshole, Aberdare.*

(1) [1893] 1 Q. B. 44.

W. J. B.

C.A.
1895
Feb. 26.

[IN THE COURT OF APPEAL.]

ST. GEORGE'S LOCAL BOARD *v.* BALLARD.

Local Government—Streets—By-Laws—Laying out New Street—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

Where the owner of a strip of land by the side of a lane which ran into a road began to build on a portion of his land a house fronting to the road, the side of which abutted on the lane, and there was nothing to shew any intention on his part of building other houses along the lane on the remainder of his land:—

Held, that he was not laying out a new street along the lane within the meaning of by-laws with respect to the construction of new streets made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157.

APPEAL from the judgment of Lawrance J. at the trial without a jury.

The action was for an injunction to restrain the defendant from laying out or constructing a new street of a less width than thirty-six feet contrary to the plaintiffs' by-laws.

The facts, so far as material, were as follows:—

The plaintiffs were the urban sanitary authority for the parish of St. George, which formed part of the suburbs of Bristol. There was within the plaintiffs' district, on the outskirts of the city, a lane or roadway, about 8 feet wide and 175 feet in length, which ran at right angles into a main road called Church Road, and at the other end formed a cul-de-sac. On one side of this lane, and fronting to it, was a row of houses called Providence Place, which had existed for many years; and on the other side was a strip of land which had formerly been used for gardens for the houses in Providence Place. The defendant had recently bought this piece of land. The defendant had laid before the plaintiffs plans of three houses which he proposed to build on a portion of the land which he had so purchased; but the plaintiffs refused to approve of his plans, on the ground that the proposed buildings were in contravention of their by-laws with regard to the laying out of new streets. The buildings which the defendant proposed to build were a row of three houses intended for shops, fronting to and entered from Church Road. The side of

one of the houses, which was at the corner where the lane joined Church Road, abutted upon the lane, the wall of the house, together with that of a garden attached to it, extending along the lane to a distance of eighty feet from Church Road. A width of eight feet only was left between this wall and the houses in Providence Place. The plan shewed that the corner house had no shop window fronting the lane. The defendant, notwithstanding the disapproval of his plans by the plaintiffs, was proceeding with the proposed buildings.

The by-laws made by the plaintiffs, under the Public Health Act, 1875, s. 157, which empowers urban authorities to make by-laws with respect to the level, width, and construction of new streets, provided as follows :—

4. Every person who shall lay out a new street, which shall be intended for use as a carriage road, shall so lay out such street that the width thereof shall be thirty-six feet at least. 5. Every person who shall construct a new street, which shall exceed 100 feet in length, shall construct such street for use as a carriage road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage road. 6. Every person who shall lay out a new street, which shall be intended for use otherwise than as a carriage road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be twenty-four feet at the least.

The learned judge held that it was not shewn that the defendant was laying out a new street, and he therefore gave judgment for the defendant.

Bosanquet, Q.C., and *Lord Coleridge, Q.C.* (*F. R. Y. Radcliffe*, with them), for the plaintiffs. The defendant by the building which he is erecting is beginning to lay out and construct a new street. For this purpose "street" means a street in the popular acceptation of the term. The lane in the state in which it was before the defendant's building was begun was not in that sense a "street." It is true that there may be a "street" with houses on one side of it only. But this was merely a rural lane on the outskirts of a town, by the side of which were some houses

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looking over the open country. The defendant has commenced the process of changing its character from that of a rural lane into that of an urban street by closing up with building a considerable portion of the opposite side of the lane. If the building of this house is allowed, a street may be created only eight feet in width, for the defendant or his vendee may subsequently build other houses up to the same line along the rest of the land, and so the object of the by-law will be entirely frustrated. [They cited *Vestry of St. Giles, Camberwell* v. *Crystal Palace Co.* (1); *Robinson* v. *Local Board of Barton Eccles* (2); *Taylor* v. *Corporation of Oldham* (3); *Mayor, &c., of Portsmouth* v. *Smith* (4); *Taylor* v. *Metropolitan Board of Works* (5); *London County Council* v. *Lawrance & Sons* (6); *Roberts* v. *Richards.* (7)]

E. U. Bullen, and *W. Lloyd*, for the defendant, were not called upon to argue.

LORD ESHER M.R. The judge has found as a fact that the defendant was not, by what he did, beginning to lay out a new street. The question is one of fact, and we are asked to overrule the finding of the judge upon that question of fact. If it could be shewn that this house, which the defendant is beginning to build at the corner of the lane, was the beginning of a row of houses which he intended to build along the lane opposite to Providence Place, the case might be brought within the by-laws. But the facts do not appear to me to shew any such intention on his part. All that he has done with regard to the lane is to begin to build this one house at the corner, one side of which abuts upon it. The house fronts upon Church Road, and is uniform with the other two houses which the defendant intends to build in that road. It appears to have no shop window in the lane, and I should say that for this purpose it must be considered as a house built in Church Road, not in the lane. The defendant has done nothing, so far as I can see, from which it can fairly be inferred that he has any intention of

(1) [1892] 2 Q. B. 33.
(2) 21 Ch. D. 621; 8 App. Cas. 798.
(3) 4 Ch. D. 395.
(4) 13 Q. B. D. 184; 10 App. Cas. 364.
(5) Law Rep. 2 Q. B. 213.
(6) [1893] 2 Q. B. 228.
(7) 54 J. P. 693.

building more houses in the lane. I do not think it can be inferred from the mere fact of his beginning to build this one house that he is laying out a new street along the line of the lane. For these reasons I think that the finding of the judge was correct, and this appeal should be dismissed.

LOPES L.J. I am of the same opinion. The question is whether the defendant has begun to lay out a new street within the meaning of the by-laws. What he has done is to commence the erection of three houses fronting on Church Road, the side of one of which abuts on this lane. It is admitted that the lane was not a street before he did this. The question is whether on that state of facts there is evidence from which we ought to infer that he is beginning to lay out a new street along the lane. If there were anything to shew that this house at the corner was the first of a series of houses to be built along the lane, the case might be brought within the by-laws. But I can see no evidence whatever that the defendant intends to do anything more with regard to the lane than to build the house which he has actually begun to build. If I had to try this case myself I could not come to the conclusion that the defendant had begun to lay out a new street. I cannot therefore say that the learned judge was wrong in the conclusion at which he arrived.

RIGBY L.J. I agree. We are asked to assume without any evidence, as it appears to me, that this house in Church Road, the side of which abuts on the lane, is intended by the defendant as the commencement of a new street more than 100 feet in length along the line of the lane. It is suggested that the defendant may build other houses along the side of the lane beyond this house. We do not know what he intends to do with the rest of his land, and I do not think we are at liberty to assume that he has any intention of doing what is suggested.

Appeal dismissed.

Solicitors for plaintiffs: *Meredith, Roberts, & Mills, for Sibly & Dickinson, Bristol.*

Solicitors for defendant: *Ridsdale & Son, for Latchams & Montague, Bristol.*

E. L.

1895
Feb. 2.

[CROWN CASE RESERVED.]

THE QUEEN *v.* TOMLINSON.

Criminal Law—Larceny—Threatening Letter—Demanding Money with Menaces—The Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 44.

In order to constitute the offence of sending a letter demanding money with menaces, within the meaning of 24 & 25 Vict. c. 96, s. 44, it is not essential that the "menace" should be a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime; the offence may be committed if there be a threat to accuse him of misconduct not amounting to an offence against the criminal law.

CASE stated for the opinion of the Court by Lawrance J.

The prisoner was tried at the Carnarvon Assizes on an indictment charging him, under 24 & 25 Vict. c. 96, s. 44, with sending a letter to one John Thomas Morgan, demanding money with menaces, and in a second count with uttering the letter. It was proved that the prisoner, who was in the prosecutor's employ, was discovered by the prosecutor and his wife in the commission of an act of immorality with a woman named Kate Youde in the prosecutor's stable, in consequence of which the prosecutor discharged the prisoner from his service. Subsequently the prosecutor received by post the following letter in the prisoner's handwriting: "On the rocks only had a day and a half work since leaving Wrexham i want you to let me have 10s. so that i can get a can and brush and if i do not get it on or before Tuesday morning i shall let Mrs. Morgan and your friends know of yours doings with (Kate Youde) you must understand i am not going to suffer to hide you i have had enough of it. You are at liberty to show this to your lawyer or anyone else if you like but i shall certainly do it."

At the close of the case for the prosecution the prisoner's counsel contended that the menaces contained in the letter were not menaces within the meaning of s. 44 of 24 & 25 Vict. c. 96, but that such menaces must be of injury or violence to the person or property, or of accusation, as contained in ss. 46 and 47 of that statute. The objection was overruled, and the

prisoner was found guilty by the jury, but was released from custody pending the determination of this case.

The question for the opinion of the Court was whether the learned judge was right in holding that the threats contained in the letter above set out were such threats as were contemplated by s. 44. (1)

No counsel appeared on either side.

LORD RUSSELL of KILLOWEN C.J. This case is not altogether free from difficulty, and I regret that it has not been argued before us. The question turns upon the true construction of s. 44 of the Larceny Act, 1861; but in order to determine it we must look at other sections of that Act which deal with a cognate subject-matter. The next section deals with the demanding of property with menaces or by force with intent to steal it, while s. 46 deals with the offence of sending a letter threatening to accuse a person of crime with intent to extort money or other property, and it should be observed that the

(1) By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 44, "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing, shall be guilty of felony . . . ."

By s. 45, "Whosoever shall with menaces or by force demand any property . . . . of any person, with intent to steal the same, shall be guilty of felony . . . ."

By s. 46, "Whosoever shall send, ... &c., any letter or writing, accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security or other valuable thing, from any person, shall be guilty of felony . . . ."

By s. 47, "Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with a view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, ... &c., shall be guilty of felony . . . ."

By s. 49, "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender or by any other person."

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class of accusations dealt with by that section are accusations of crime only. In addition to these sections I need only refer to s. 49, which makes it immaterial whether the menaces or threats are of violence, injury or accusation to be caused or made by the offender or any other person. Coming back to the question of the construction of s. 44, we have to ask ourselves the question whether the sending of this letter is evidence of demanding money with menaces.

The point was taken by the prisoner's counsel that the word "menaces" as used in s. 44 imported a threat of injury to the person or property; in other words, that it must be a menace or threat suggesting that, in the event of the demand not being complied with, some injury would be caused to the person or property of the person threatened. Is this narrow meaning to be placed upon the word? In s. 45 a distinction is drawn between two classes of menaces; the language used is "with menaces *or* by force," and it would therefore seem that the legislature contemplated that under the word "menaces" would be included not merely threats to person or property, but also menaces involving no doubt a threat of injury, but of injury not confined to the person or property of the person threatened. In the present case one can see the threat in the letter—a threat to disclose to the wife of the prosecutor alleged indecent behaviour on his part; and the injury so threatened might be much more serious than many cases of injury to person or property. I should have regretted if the Court had felt compelled to confine the construction of the word "menaces" in the way suggested, with the result of excluding such conduct as that of the prisoner from the purview of the criminal law. It is suggested that s. 49, in saying that it shall be immaterial whether the menaces or threats are of violence, injury or accusation, refers only to violence to the person, injury to the person, or such an accusation of crime as is contemplated by s. 46; but on the whole, though not without hesitation, I think that the word "menace" has a wider meaning than that for which the prisoner's counsel contended at the trial, and that it may well be held (though I am laying down no exhaustive definition of the word) to include menaces or threats of a danger by an accusation of misconduct, though of mis-

conduct not amounting to a crime, and that it is not confined to a threat of injury to the person or property of the person threatened.

There is some warrant for this interpretation. What is the meaning of "menace" in the dictionaries? Johnson, Richardson and Worcester give it as a "threat"; Ogilvie and Webster as a "threat or threatening; the declaration or indication of a disposition or determination to inflict an evil; the indication of a probable evil or catastrophe to come." There being no definition in the statute of the precise meaning which the legislature intended to attach to the word, we must give it its natural ordinary meaning, unless that can be displaced by something in the context or in other portions of the statute. I see nothing in this statute which ought to lead us to give the word the restricted meaning suggested.

Authority upon the question is not very strong. In *Reg.* v. *Smith* (1) a letter of a very extraordinary kind was written threatening great evil to a bank, which was to be avoided if 250*l.* was deposited in a place indicated; the question was whether this came within 7 & 8 Geo. 4, c. 29, s. 8, the provisions of which are reproduced in the statute which we are now considering, and the Court held without any hesitation that it did. One other case may be noticed, that of *Reg.* v. *Walton* (2), and I refer to this because the Court, while stating what it conceived to be the meaning of the section, pointed out the character of the menace which must be used before it could come within the meaning of the statute. In that case the prisoner had threatened to execute a distress warrant, which he had no authority to do; and the conviction was quashed on the ground that it was not for the judge to do more than lay down the principle on which the jury should proceed in considering whether the menace was a menace within the meaning of the statute; that it was not for him to say as a matter of law that the prisoner's conduct constituted a menace within the statute, and that he ought to have told the jury that the question was whether the threat or words used were such as would naturally and reasonably operate on the

(1) 1 Den. C. C. 510; 19 L. J. (M.C.) 80.

(2) L. & C. 288; 32 L. J. (M.C.) 79.

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mind of a reasonable man; in other words, whether they would have such an effect on such a person as to deprive him of his free volition and put a compulsion on him to act as he would not act otherwise. In the present case no question arises as to the ruling of the learned judge; the jury have come to the conclusion that the threat was a threat of that description; and the only point for us is whether it is a menace within the statute. For the reasons I have given, I think the conviction was right.

POLLOCK B. I am of the same opinion, and have nothing to add.

WILLS J. I am of the same opinion. I think that the case comes within s. 49, although it is not necessary that it should do so; the words "injury" and "accusation" ought to receive a liberal interpretation, and not to be confined to any specific class of injuries or accusations; that which will do a person harm comes, in my opinion, within the meaning of "injury." I do not think that the word "accusation" is confined to cases coming within s. 46, which deals with accusations of offences of a peculiarly bad character, nor can I think that it applies only to accusations of criminal offences; it must have the meaning given it in ordinary language. With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody.

CHARLES J. I am of the same opinion. I can see nothing in the other sections of the statute which places any restriction on the word "menace" in s. 44.

LAWRANCE J. concurred.

Conviction affirmed.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1894
Dec. 3.

FOSTER *v.* LONDON, CHATHAM AND DOVER RAILWAY COMPANY.

Railway Company—Land acquired for Purposes of Undertaking—Line carried over Arches—Temporary letting of Interiors of Arches for purpose of Profit —Implied Powers of Railway Companies.

A railway company authorized by their special Act to acquire land for the purposes of the railway and works have also the implied power of using land so acquired in any manner which is not an infringement of the rights of other persons and which is not inconsistent with the purposes for which the company was constituted.

A railway company acquired in fee simple, under their compulsory powers, a strip of land on which they constructed a railway carried over a series of arches. The company afterwards let the interiors of the arches for shops and other business purposes to divers persons upon short tenancies, reserving power to resume possession when they deemed it necessary for the purposes of the railway so to do :—

Held, affirming the decision of Mathew J., that such a letting of the arches was not inconsistent with the purposes for which the company was constituted.

The ratio decidendi of Malins V.C. in *Norton* v. *London and North Western Ry. Co.* (9 Ch. D. 623) disapproved of.

APPEAL from the judgment of Mathew J. in favour of the defendants in an action for an injunction to restrain them from obstructing a footpath at Clapham, Surrey.

The statement of claim alleged that the defendants took from him, under the compulsory powers contained in their special Acts and the Lands Clauses Consolidation Act, 1845, certain lands at Clapham in Surrey, "which were stated by the defendants to be required partly for the purposes of the railway and partly for a footpath"; that upon part of the lands so taken the railway of the defendants was constructed, and upon part a footpath was laid out leading from the Bedford Road to the High Street, and affording the plaintiff and his tenants access to the said streets and to the defendants' station; that the railway of the defendants upon the lands in question was constructed upon arches, and many of those arches had been leased by the defendants to various persons; that these persons had from time to time in recent years, with the consent of the defendants, but without the consent of the plaintiff, wrongfully taken in portions of the strip of land acquired by the defendants for a footpath, and had in

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some cases erected sheds, chimneys, and other buildings upon or overhanging portions of this said strip of land, and had encroached upon land belonging to the plaintiff, and that some of the persons occupying the arches were in the habit of throwing refuse and materials upon adjacent portions of the plaintiff's land. The plaintiff alleged that by reason of those wrongful acts, and of the failure of the defendants to maintain a fence between the boundary of their land and that of the plaintiff, he had suffered loss and injury, and he claimed (1.) an injunction to restrain the defendants and their tenants from continuing to occupy or overhang with buildings or otherwise obstruct the said strip of land or footpath, and from encroaching upon his lands; (2.) a mandamus commanding the defendants to restore the said strip of land, and to maintain a good and sufficient fence below the boundary of their land and that of the plaintiff; and (3.) damages for the nuisance to him by reason of these wrongful acts and trespassing by the defendants and their tenants on his land. The defendants denied the commission of any wrongful act, and, as to the footway, maintained that the whole strip of land was acquired by them without any restriction, that the alleged footpath on the south side of their line had only been used for a temporary purpose, and that, finding it would be more convenient to have an approach to the station on the north side of their line, they had made one; and that, when the temporary path was abandoned, they had let a portion of it with each arch as a backyard; and they alleged that the plaintiff had not shewn any right of action.

There was evidence that the strip of land in question was not superfluous land, that the whole of it was within the limits of deviation, and that the arches and the pieces of land behind them were not let for longer periods than from year to year, and that power was retained by the defendants to resume possession of them on short notice whenever it was necessary to do so for the purposes of their railway.

At the trial of the action before Mathew J. and a jury the plaintiff not only complained of the nuisance, inconvenience, and injury caused to him by such alleged wrongful acts of the defendants, but also contended that the defendants, having taken

the land in question compulsorily for the purpose of their railway, had no right to let the arches or the pieces of land behind them for business purposes, and that he was entitled to an injunction to restrain them from so doing.

The jury found that the strip of land in question had been acquired out and out by the defendants, without any restriction as to user as a footway; and the learned Judge held that the temporary use of the arches and the pieces of land behind them under short tenancies was not incompatible with the objects of the company, as they could, if necessary, recover possession at any time. He accordingly held that it was within their powers, and gave judgment for the defendants; but, while he thought that what the company had done was prejudicial to the interests of the plaintiff as an owner of building land, he pronounced no opinion upon the question whether there was such a substantial interference with the plaintiff's rights as would amount to a nuisance, inasmuch as no such case had been pleaded or set up by evidence.

The plaintiff appealed.

Lawson Walton, Q.C., and *G. M. Freeman*, for the plaintiff. The railway company took this land compulsorily from the plaintiff for the purposes of their railway. It is not superfluous land. It is not land of which they are making a temporary use until it is ascertained whether it is superfluous or not, but it is land which they have acquired permanently for the purpose of constructing their railway upon it, and of carrying goods and passengers over it. And they have no right to alienate it or to use it for any purpose not contemplated by the Act under which it was taken. Their position in this respect is quite different to that of a private individual. But what they have done is this. For the purpose of making a revenue beyond that derived from their railway they have let these arches and the pieces of land behind them for shops, warehousing, and other purposes, to the prejudice of the plaintiff; and they are competing as rivals with their neighbours in businesses unconnected with the purposes for which they were incorporated and invested with compulsory powers. Such a user of the land they have taken is ultra vires, and

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should be restrained by injunction: *Bostock* v. *North Staffordshire Ry. Co.* (1); *Colman* v. *Eastern Counties Ry. Co.* (2); *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (3) In *Attorney General* v. *Great Eastern Ry. Co.* (4) Lord Watson says (p. 486) that "when a railway company has been created for public purposes, the legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication." It is true that Bramwell L.J., in his judgment in that case when before the Court of Appeal (5) excepts from this principle "things done which may be called ancillary or subordinate to the main purpose of the railway company, or arising out of or consequent on its existence." But the letting of these arches does not fall within this category. Though a railway company have the fee simple in the land they have taken for the purpose of their railway, "they have it in that qualified manner in which land taken for particular purposes is taken." See Malins V.C. in *Norton* v. *London and North Western Ry. Co.* (6); *United Land Co.* v. *Great Eastern Ry. Co.* (7); *Bonner* v. *Great Western Ry. Co.* (8) In the words of Jessel M.R. in *Mulliner* v. *Midland Ry. Co.* (9), railway companies have "not the ordinary rights of ordinary proprietors, but the legislature empowered them to acquire and hold and use the lands merely for the special purposes of the Act"; and no private owner even can let his land so as to create a nuisance to his neighbour. If the landowner in this case could have foreseen the use to which the railway company would put his land, or the extent to which such use would prejudicially affect his adjoining lands, he would have largely increased his claim for compensation.

Kemp, Q.C., *Mansel Jones*, and *Croft*, for the defendants. All claim for damages in respect of the alleged nuisance has been abandoned, and there is in fact nothing of the original case left, for the case now made, that the letting of the arches and strips

(1) 4 E. & B. 798; 3 Sm. & Giff. 283.
(2) 10 Beav. 1.
(3) Law Rep. 7 H. L. 653.
(4) 5 App. Cas. 473.
(5) 11 Ch. D. 449, 505.
(6) 9 Ch. D. 623, 627.
(7) Law Rep. 10 Ch. 586, 589.
(8) 24 Ch. D. 1.
(9) 11 Ch. D. 611, 622.

behind them by the company is ultra vires, was not raised upon the pleadings, and upon the pleadings the plaintiff is not entitled to any injunction. But apart from that question, while admitting that the company cannot alienate any part of this land, there is no reason why it should not make a temporary profit by a temporary use of the land which is not incompatible with the objects for which it was incorporated, but is ancillary or subordinate to its main purpose within the meaning of Bramwell L.J. in *Attorney General* v. *Great Eastern Ry. Co.* (1) The company only lets these arches and strips of land upon weekly, monthly, or yearly tenancies, power being reserved to the company to resume possession whenever possession is required for the purposes of the railway, and in that mode of user there is nothing incompatible or inconsistent with the purposes of the company's undertaking: *Rex* v. *Leake* (2); *Grand Junction Canal Co.* v. *Petty* (3); *Ashbury Railway Carriage and Iron Co.* v. *Riche* (4); *Mulliner* v. *Midland Ry. Co.* (5); *Attorney General* v. *Great Eastern Ry. Co.* (1); *Bayley* v. *Great Western Ry. Co.* (6); *Teebay* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (7)

Freeman, in reply.

LORD HALSBURY. I am of opinion that the judgment of Mathew J. must be affirmed.

I have some difficulty in dealing with this case, because many of the questions raised by the statement of claim have practically been abandoned, and I am afraid that in the observations I am about to make I may be said to be pronouncing an obiter dictum on matters that do not now arise. Still, after the arguments which have been addressed to the Court, I should not like the question to go off on a point of pleading or of the particular form of remedy sought by the statement of claim.

Broadly, I think one may say this—the railway company have acquired this piece of land, and are entitled to use it subject to these considerations. The legislature has given them power to take land compulsorily in consideration of the benefit the public

(1) 5 App. Cas. 473.
(2) 5 B. & Ad. 469.
(3) 21 Q. B. D. 273.
(4) Law Rep. 7 H. L. 653.
(5) 11 Ch. D. 611, at p. 619.
(6) 26 Ch. D. 434.
(7) 24 Ch. D. 572.

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would derive from their carrying on the business of a railway company, which includes the conveyance of passengers and the forwarding of goods along their line, and in my view they could be restrained from alienating the property they have taken if they were to affect to deal with it in such a way as would disable them from carrying on their business as a railway company, because in so doing they would be departing from the bargain to carry on their public business which the legislature has in fact imposed upon them as the consideration for the grant of compulsory powers to take land. Again, if a shareholder was to put forward the case that the railway company were carrying on some trade or occupation which he, as a shareholder, did not consent to their spending his money upon, or applying their funds to, they might be restrained if that could be made out. Or again, if the Attorney General thought it right to intervene on the ground that the company were carrying on a business which was not authorized by the statute under which their powers were granted, they might be restrained. But, subject to these considerations, a railway company can deal with its own property like an individual.

It is said that the use which the defendants make of this particular piece of land is one not authorized by the statute. Expressly authorized by the statute it is not. No minute or ancillary use of such part of a railway company's property is ever expressly given by statute; but I think it might just as reasonably be contended that a railway company are not entitled to sell the hay which grows on their banks or cuttings so as to make something out of it. In fact it would be possible to specify a great variety of uses which might be made of part of a company's property which do not form a necessary portion of the business of carrying passengers or goods, and yet are uses not inconsistent with the purpose for which the statute has incorporated the company. Now, let us see what this particular use is. The company are carrying their line of railway along a line of arches. The arches, I presume, are a cheaper form of support than a solid embankment. This causes a number of hollow spaces to be left which may be used for a variety of purposes. They may be used for the purpose of shops, or for

habitations, although they would not be very comfortable, but at all events for various purposes. The maintenance of the railway involves the existence of these arches. But it is said that the company must not use them for any other purpose. It seems to me that that is an entire misapprehension of all the cases. The authorities seem to me to run all one way, but not in favour of the view which was contended for by the plaintiff.

In the first place, as to *Bostock* v. *North Staffordshire Ry. Co.* (1) it seems to me that the rights of the adjoining proprietor in that case were, rightly or wrongly, supposed to rest on the peculiar words of the statute; and in the cases to which we have been referred no adjoining proprietor has ever suggested that he has a right to prevent some use of the property of the railway company of which any other person (apart from his being an owner from whom the land was purchased) would not equally have a right to complain; and I observed that Mr. Freeman (as I should have expected from him) said he did not want to argue this question—that it was not necessary for his purpose, because in this case the land was purchased from the plaintiff. But, speaking for myself, I am not aware of any principle upon which a claim confined to this case can rest. It either must be put on an express or an implied covenant by the railway company that they will do nothing that will annoy; not that they will do nothing that will involve legal injury; because a man would have a right to bring an action for a private nuisance. It is admitted that in this case there is no private nuisance. So it comes back to this—that there must be some express language of the statute or some covenant implied in the statute that nothing shall be done which shall render the use of the property taken inconvenient or annoying to the adjoining property. For that proposition I think we have complete absence of authority.

The only case that I remember which runs in the other direction is *Norton* v. *London and North Western Ry. Co.* (2), which

(1) 4 E. & B. 798.

(2) 9 Ch. D. 623. [Affirmed on another ground in C. A., 13 Ch. D. 268, as to this point see at pp. 275-6; and see per Baggallay L.J. in *Bonner* v. *Great Western Ry. Co.*, 24 Ch. D. 1, 9.—F. P.]

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was in respect of a board put up by a railway company to prevent the acquisition of light by the owner of a house near their line. Whether that case has been approved of or not, I am bound to say for myself that if the proposition to which I have referred was necessary to the decision I should entirely disagree with it, and when the matter came before the Court of Appeal afterwards it is clear that that point never was approved of at all. I quite adopt Mr. Freeman's view, and I think it is a very just observation to make, that, apart from the question which is raised in this case, the railway company might well say that for the protection and preservation of their own property they would be entitled to prevent the acquisition of rights by ancient lights being established without their consent. Therefore I do not treat that decision as against the present defendants. It seems to me that it leaves the question entirely without authority.

I have now to see whether there is anything in the Act of Parliament which prevented this use of the railway arches; and I think the question must come to that. If the company have the right to let the railway arches it is impossible to contend that they cannot let these little pieces of land, which give additional accommodation to the railway arches, in the form in which they are let. I for one entirely deny that there is any established proposition of law which prevents the railway company using this land and their arches for some collateral purpose that may give profit to them. A great variety of examples have been given by various judges of things which may be done by railway companies besides their own particular business. It is familiar to us all that coal stores and bookstalls, and a great variety of things may be set up by railway companies which, although not actually used in the business of carrying passengers and goods, are nevertheless things which they may do, and yet carry on their own particular business quite consistently. I for one should be sorry to place any restriction on their power to make, to the best of their ability, their undertaking profitable to their shareholders and a convenience to the public. In anything I have said I am not in the least endeavouring to undervalue the inconvenience and annoyance—and in one sense injury—that this possibly may be to the present plaintiff. I can

quite understand it may be an annoyance to him. All I say is, I cannot see that any legal right of his has been infringed.

LINDLEY L.J. This case is a very clear and plain one, and I do not hesitate to say that I think the plaintiff has been wrong from beginning to end. That he was wrong in the way in which he launched his case is obvious, because he has failed altogether to establish the ground on which by his statement of claim he sought relief. I allude to the supposed bargain or supposed trust by which this company is there stated to have been bound not to use this footpath for any other purpose, and I also refer to the failure to prove the nuisance alleged in the statement of claim.

Then the plaintiff, having failed on those grounds, has recourse to another, which would be a much more plausible one than the first if it were well-founded on the real facts of the case. He says that the railway company have exceeded their statutory powers, that he is damnified thereby, and that this is a cause of action either at Common Law for damages, or in Chancery for an injunction. For the purpose of maintaining that proposition he refers (amongst others) to the case of *Bostock* v. *North Staffordshire Ry. Co.* (1). If the plaintiff is well-founded in his allegation that the railway company have exceeded their powers, and that he is damnified, then the authorities on which he relies entitle him to relief, although no right peculiar to him is infringed. I think the case of *Bostock* v. *North Staffordshire Ry. Co.* (1) goes that length, and there are certainly cases to be found before Lord Eldon and Lord Cottenham in Chancery which sanction that proposition. It is plain that the plaintiff is damnified.

But it is necessary to consider whether the defendants are exceeding their statutory rights. What is the measure of their rights? The law on that point is now settled; and I do not know that it can be better stated than in the various judgments given by Lord Selborne and his colleagues in the House of Lords in the case of the *Attorney General* v. *Great Eastern Ry. Co.* (2). Lord Selborne says this: "I assume that your Lordships

(1) 4 E. & B. 798. (2) 5 App. Cas. 473.

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will not now recede from anything that was determined in the *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1) It appears to me to be important that the doctrine of ultra vires as it was explained in that case should be maintained. But I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires." Then he says: "In the present case I think, with the Court below, that the acts which the information was filed to restrain are not ultra vires of the defendant company. But I come to that conclusion not on the ground that they are such acts, on the border line between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given, but because I think they are expressly authorized by the 14th section of the Act of 1863."

There is nothing in the company's Act which expressly authorizes the letting of these arches. Then comes the question whether it is to be fairly implied, and if so, what is the limit of power? Now, it appears to me that, with the exception of one single case before Malins V.C., all the authorities are consistent with the proposition that any mode of enjoying a company's own land is impliedly permitted if it is not inconsistent with the provisions of the company's Acts, and is not an infringement of the rights of other persons. With the single exception of that case before Malins V.C., I have not found one authority which is inconsistent with that. The legislature does not specify anything upon the point, but it specifies expressly the purposes for which the company is formed. It gives the railway company power to acquire land and power to use that land for any purpose which does not infringe the rights of others, and is not inconsistent with the purposes for which the company was formed. I believe that is the true and sound proposition. Certainly there is the direct authority of this Court in *Bonner* v. *Great Western Ry. Co.* (2), which has been referred to. I admit that the case of *Norton* v. *London and North Western*

(1) Law Rep. 7 H. L. 653. (2) 24 Ch. D. 1.

Ry. Co. (1) is entirely opposed to such a doctrine. In that case Malins V.C. went the length of saying that a railway company were exceeding their powers when they put up a hoarding to obstruct a neighbour's light. I must say I cannot follow that at all. It appears to me to be contrary to sound principle. It is certainly not warranted by any other decision in the books, and it is in my opinion quite inconsistent with other decisions. Although that decision of Malins V.C. was affirmed on appeal, it was affirmed on different grounds.

I think the case put forward on behalf of the appellant in this Court fails just as much as the case in the Court below failed, and this appeal, therefore, must be dismissed with costs.

A. L. SMITH L.J. I also am of opinion that this appeal fails. I will take it that the indorsement on the writ, the statement of claim, and all the pleadings have been amended so as to raise the real question now submitted to this Court, which is whether the appellant is entitled to an injunction to restrain the railway company from in future letting to tenants these arches with the appurtenances behind them. The question of trespass, which was originally started in the pleadings, and the question of nuisance to the appellant, are both out of the case. The damages also are gone, and the sole remaining question is whether or not the plaintiff is entitled to the injunction. It is proved that in 1861 the railway company purchased in fee simple, under the sanction of their Act, the land upon which they built these arches, and upon which the footway was in the first instance made. An attempt was made to set up the case that they did not buy the land as owners in fee, but bought it subject to some restrictions. That point, however, went to the jury, and was the subject of a finding contrary to the plaintiff's contention. Now, it has been argued on his behalf that inasmuch as the railway company purchased this land for the purpose of their railway, the letting of these arches and the adjuncts in the rear for profit is not a letting for the purpose of carrying on their railway, but is ultra vires, and can be restrained at his instance in a court of law. In the first place,

(1) 9 Ch. D. 623, 627.

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I would point out that no legal right of the plaintiff has been infringed. He cannot say that he has suffered any damage for which he could bring an action against the railway company, and therefore it is contended that as he has no such right he has no locus standi at all in the present action. But I do not decide this case upon this question; I decide it on the ground that I am satisfied on the authorities cited that there is no foundation for the proposition which is put forward by the plaintiff that when a railway company has purchased land for the purpose of a railway they are not authorized to do anything more thereon than to run trains backwards and forwards and to have stations and so on for the purposes of carrying goods and passengers upon their railway. It seems to me that the real question which is now before the Court was originally dealt with in the case of *Rex* v. *Leake*. (1) I do not cite that case as being in point here, but for the passage in Parke J.'s judgment in which he says (p. 478): "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway" (the question in that case was whether they could use their bank for the purpose of a highway), "I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible"—now, here is his real meaning—"with the objects prescribed by the Act, then I think it clear that the commissioners have that power." That is supported in different decisions, in different language, in the House of Lords; and Lord Blackburn upon this point, in the *Attorney General* v. *Great Eastern Ry. Co.* (2), when dealing with the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche* (3), says: "That case appears to me to decide, at all events, this—that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by Act of Parliament for the purpose

(1) 5 B. & Ad. 469. (2) 5 App. Cas. 473, 481.
(3) Law Rep. 7 H. L. 653.

of working a line of railway, is prohibited from doing anything that would not be within that purpose"—that means, within the Act of Parliament. "My Lords, I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." Now, where is there any case contrary to this? It has been pointed out by Lord Halsbury and by Lindley L.J., and also by Mathew J., that the only case to the contrary is *Norton* v. *London and North Western Ry. Co.* (1), decided by Malins V.C., where he prohibited a railway company from putting up a hoarding to protect their own property from the acquisition of a right to light by a neighbouring owner. I do not myself see why he should have prohibited the railway company from doing this any more than from putting up a fence to protect their own property; and I am not surprised that that case has not been followed, nor is it law. It seems to me, upon these considerations, that the letting of these arches, which is the sole cause of complaint left to the plaintiff, comes within the words—that they are things which are incidental to and proper to be done by the defendants under the main purpose for which they were incorporated, although they may not literally be within the words of their Act.

Upon this ground, I am of opinion that this appeal fails, and, although I am sorry that the plaintiff should have suffered inconvenience, as my brother Mathew has stated, and as is no doubt true, yet he fails on this issue, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Rowcliffes, Rawle & Co.; J. Lewis Morgan.*

(1) 9 Ch. D. 623.

W. W. K.

C. A.
1895
March 15, 16.

[IN THE COURT OF APPEAL.]

IN RE LORD THURLOW. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Adjudication—Discretion to Postpone—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-s.* 1; *s.* 105, *sub-ss.* 2, 4; *s.* 109.

Upon an application for adjudication of bankruptcy against a debtor in a case within s. 20, sub-s. 1, of the Bankruptcy Act, 1883, the Court of Bankruptcy is not bound forthwith to adjudge the debtor bankrupt, but may for good reason adjourn the proceeding under s. 105, sub-s. 2, of the Act.

APPEAL by the official receiver against an order of a registrar refusing immediately to adjudicate the debtor a bankrupt as after mentioned.

The facts were as follows. A bankruptcy petition was presented against the debtor on February 7, 1894, the act of bankruptcy alleged being non-compliance with a bankruptcy notice. A receiving order was made on April 5. The first meeting of creditors was held on June 20, and adjourned till July 18, in order to enable the debtor to submit a scheme of arrangement.

On July 18 an incomplete proposal for an arrangement was submitted to the meeting, the scheme of which was that the proofs of certain creditors, particulars of which were to be afterwards supplied to the meeting, should be withdrawn, and the assets of the debtor should be vested in a trustee for the benefit of the remaining creditors. The debtor not having at that time procured the withdrawal of claims by creditors to the requisite amount, the meeting was again adjourned to October 3, in order that he might amend the scheme, and endeavour to obtain further withdrawals of claims. On October 3 a further adjournment of the meeting took place to allow the debtor to endeavour to procure further withdrawals of claims. The adjourned meeting was held on January 2, 1895, when only four out of a large number of creditors attended. An application for a further adjournment for six weeks was made by the debtor's solicitor, in order that the debtor, who was stated to have gone to India to make arrangements for the purpose of carrying out the scheme, might have time to return and report progress. The

motion to adjourn the meeting further was not carried. The scheme was then withdrawn, and the meeting separated without passing any resolution. On February 20 the debtor, whose examination had been adjourned till his return, was publicly examined. It appeared that he had succeeded in obtaining the consent of creditors to withdraw their claims to a very large amount. Upon February 21 the official receiver applied to the registrar for an adjudication of bankruptcy against the debtor. The registrar in deciding upon the application said, in substance, that he did not think that the sense of the creditors on the matter had really yet been taken, and that further opportunity for taking it ought to be given; and that, from what had transpired at the examination of the debtor, he came to the conclusion that an immediate adjudication of bankruptcy could only do harm to the interests of the creditors. He, therefore, did not adjudicate the debtor a bankrupt, but made an order extending the time for fourteen days to enable the debtor to lodge a proposal for a scheme for the arrangement of his affairs under s. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). (1)

(1) Bankruptcy Act, 1883, s. 20 (1.): Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

Sect. 105 (2.) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose. (4.) Where by this Act or by general rules, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose.

Sect. 109: The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just.

Bankruptcy Act, 1890, s. 3 (1.): Where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing signed by him, embodying

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Sir R. T. Reid, A.G., and *Muir Mackenzie*, for the official receiver. The first meeting of creditors having passed no resolution, the registrar was bound by the express terms of s. 20, sub-s. 1, of the Bankruptcy Act, 1883, to adjudicate the debtor a bankrupt. The words of the sub-section are "shall adjudge the debtor bankrupt." The word "shall" is imperative, and gives no discretion to the Court. On the happening of any of the events mentioned in the section the Court must forthwith make an adjudication of bankruptcy. The power to adjourn proceedings, under s. 105, sub-s. 2, cannot be taken to apply to cases in which the terms of the Act import that a thing shall be done at once. The power to stay the proceedings given by s. 109 only applies to a general stay of proceedings in a bankruptcy. The general principle upon which the provisions of the Act are based is that it is most essential that, after a receiving order has once been made, either an adjudication should take place or some arrangement should be arrived at as soon as possible, and the object of the sub-section is to secure that result. In the present case the receiving order was made as long ago as April 5, 1894, and as yet neither has there been an adjudication nor has a complete scheme of arrangement been brought forward or adopted. The Bankruptcy Acts do not contemplate that, after the happening of any of the events mentioned in s. 20, sub-s. 1, an opportunity should be given for propounding a fresh scheme before an adjudication is made. Sect. 3 of the Act of 1890 does not involve that there should be a power of adjourning the adjudication for that purpose. A composition or scheme of arrangement can be carried out after an adjudication. See s. 23 of the Bankruptcy Act, 1883. The

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the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and setting out particulars of any sureties or securities proposed. (2.) In such case the official receiver shall hold a meeting of creditors, before the public examination of the debtor is concluded, and send to each creditor, before the meeting, a copy of the debtor's proposal with a report thereon; and if at that meeting a majority in number and three-fourths in value of all the creditors who have proved resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors, and, when approved by the Court, shall be binding on all the creditors.

decision in *In re Pinfold* (1) is a clear authority in favour of the official receiver's contention. It is true that the judges, following a dictum of James L.J. in *Ex parte McCulloch, In re McCulloch* (2), said that in some cases there might possibly be a discretion under s. 20, sub-s. 1, but they did not decide that to be so. [They also cited *In re Reed, Bowen, & Co.* (3)] Assuming that the registrar had a discretion to adjourn the proceedings, he exercised such discretion wrongly under the circumstances of the present case. There was no sufficient reason for not proceeding at once to adjudicate the debtor a bankrupt in accordance with s. 20, sub-s. 1. Great delay had taken place since the receiving order was made, and no satisfactory scheme of arrangement had been arrived at. It is submitted that there ought to be no further delay. If there be any real prospect of an arrangement advantageous to the creditors being made, such an arrangement can be equally well made after adjudication.

Pollard, and *L. W. Kershaw*, for the debtor. The registrar was not absolutely bound, under s. 20, sub-s. 1, immediately to adjudicate the debtor a bankrupt, but had a discretion for good reason to adjourn the proceeding. This clearly appears from what was said by the Master of the Rolls and Lopes L.J. in *In re Reed, Bowen & Co.* (3), and, though Fry L.J. dissented in that case, it was not on that question. The registrar did not finally refuse to adjudicate the debtor a bankrupt; he merely postponed the proceeding, which he had power to do under s. 105, sub-s. 2, of the Act. [They also referred to s. 105, sub-s. 4, and s. 109 of the Bankruptcy Act, 1883, and s. 3 of the Bankruptcy Act, 1890.]

Assuming that the registrar had a discretion for good reason to adjourn the proceeding, there was good reason in the present case for an adjournment, and the registrar rightly exercised his discretion by making the order which he did. He had heard the statements of the debtor as to the position of his affairs, and came to the conclusion that under the circumstances an immediate adjudication could do nothing but harm to the creditors, and that, owing to the small number of creditors who attended

(1) [1892] 1 Q. B. 73. (2) 14 Ch. D. 716.
(3) 19 Q. B. D. 174.

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the adjourned first meeting, the creditors as a body had really not had an opportunity of considering the matter, and, therefore, there ought to be a postponement in order that a scheme of arrangement might be submitted, which could be done under s. 3, sub-ss. 1, 2, of the Bankruptcy Act, 1890. The Court can extend the time for submitting such a scheme under s. 105, sub-s. 4, of the Bankruptcy Act, 1883.

It is contended that the view the registrar took was justified by the facts, and that being so he had good reason for the course he pursued.

Muir Mackenzie, in reply.

LORD ESHER M.R. In this case there has been a most strenuous contention on behalf of the official receiver for a general principle in regard to the construction of s. 20, sub-s. 1, but the reasons why that contention should have been so strongly insisted on are not very clearly apparent to me. In this case a receiving order having been made against the debtor, an application was made by the official receiver for an adjudication of bankruptcy against him. The registrar has not finally refused to adjudge the debtor bankrupt. Whether in the end he will be obliged to do so is a matter still open. The question now is whether the registrar had power to adjourn the consideration of the matter as he did. The argument here really has been that he had no power to postpone the matter, but was bound forthwith to adjudicate the debtor a bankrupt. It was said that the meaning of s. 20, sub-s. 1, of the Bankruptcy Act, 1883, is that, if any of the events mentioned in the section has happened, the Court of Bankruptcy must immediately adjudicate the debtor a bankrupt; even although the circumstances be such that any reasonable person would see that the result of a postponement of the matter might be to obtain the greatest advantage to the creditors, which could not be obtained if the debtor were at once adjudged bankrupt, and although the greatest hardship and injustice might be occasioned to the debtor. It appears to me that the Court of Bankruptcy is a Court to whose procedure the rule, that, as far as possible, mere technicalities should be brushed away in favour of what is fair and just, is especially applicable.

In so far as the power of the Court is limited by Act of Parliament, the Court must of course obey the Act, but the Bankruptcy Acts ought in my opinion to be construed as far as possible so as to give the largest discretion to the Court of Bankruptcy. The administration of bankruptcy matters from beginning to end takes place under the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of Parliament. It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the Court constantly overrules their views, if it thinks they have been persuaded to agree to some course which the Court thinks an improper one: nor is it for the official receiver to decide how the bankruptcy law shall be administered, except subject to the control of the Court. No government department has any right to interfere with the administration of the law of bankruptcy by the Court. It is the Court of Bankruptcy alone which has to administer the law of bankruptcy through its various officials, namely, the official receivers, the registrars, and above them the judge for the time acting in the administration of bankruptcy law, and finally the Court of Appeal. We are now asked to construe s. 20, sub-s. 1, so as to tie the hands of the Court in such a manner as might be productive of great injustice. I decline to do so. The word "shall" is not always absolutely obligatory. It may be directory. It may no doubt be absolutely obligatory, but one would not be inclined to construe it to be so in the case of the Court of Bankruptcy, if one could avoid it. I think that the true effect of the word "shall" in this section was explained in the case of *In re Reed, Bowen & Co.* (1), in which the Court held, on an appeal by the official receiver against the refusal of the registrar immediately to make an order adjudicating the debtor a bankrupt under s. 20, that the order was one which, if the facts alleged were made out, the registrar was bound to make judicially, unless he was entitled for good reason to adjourn the hearing. It was there said that, "if there is no sufficient reason for an adjournment, and if the facts mentioned in s. 20 are made out, the registrar would have no discretion, but would act wrongly in his judicial capacity if he did not forthwith

(1) 19 Q. B. D. 174.

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adjudge the debtor a bankrupt." The result of that case is that it is obligatory to make an adjudication of bankruptcy, unless something exists which constitutes a good reason for an adjournment. The power of adjournment is given to the Court in the largest possible terms by s. 105, sub-s. 2, of the Bankruptcy Act, 1883, which provides that "the Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose." That enactment appears to me to apply to proceedings under s. 20, sub-s. 1, as much as to proceedings under any other section, and to enable the Court, even where the case is brought within that section, for good reason to adjourn the proceedings, although in the absence of such reason it would be bound forthwith to adjudicate the debtor bankrupt. Therefore in my opinion the registrar had jurisdiction for good reason to adjourn the proceedings on this application as he did.

The only remaining question is whether in this case there was good reason for doing so. The registrar in giving his decision has stated that no one who was present at the examination of the debtor and heard what then took place could have any doubt that it would be to the advantage of the creditors that there should be an adjournment. He did not, therefore, lightly or without reason make the order for an adjournment. The Court must, no doubt, consider whether the registrar had good grounds for the course he took. It has been half suggested during the argument that registrars are in the habit of too easily granting adjournments in these cases. In a case in which it was made out that an adjournment had been granted without good reason, the Court would interfere. But in this case I am unable to say that the registrar wrongly exercised his discretion. I am unable to say that it might not be for the benefit both of the debtor and the creditors that time should be given to the debtor to amend the former proposal or to make a new proposal for an arrangement with his creditors. I do not agree that it would be wrong to adjourn the matter to enable the debtor to submit a fresh proposal, if facts were before the registrar shewing that there was a prospect of a satisfactory proposal being made. He has ample power to adjourn the proceedings for any good reason, and I cannot see that in this case there was not good

reason for what he did. On these grounds I think the appeal must be dismissed.

LOPES L.J. I am of the same opinion. In this case two questions arise. The first is whether the registrar was bound upon this application then and there to adjudge the debtor a bankrupt or had a discretion in the matter. The second question is whether, assuming him to have had a discretion, he exercised it properly. The registrar did not refuse the application, but in substance he adjourned the consideration of it, in order that the debtor might have an opportunity of submitting a proposal for a scheme of arrangement. It was argued that, having regard to the terms of s. 20, sub-s. 1, of the Bankruptcy Act, 1883, the registrar had no power to make such an adjournment; that, the word "shall" in the section being used in a mandatory sense, he had no discretion, but was bound then and there to adjudicate the debtor a bankrupt, although an immediate adjudication might be against the interests of the creditors and work injustice to the debtor. It is clear that the word "shall" is not always used in a mandatory sense. There is abundance of authority to the contrary in cases where it has been held to be directory only. But it is not necessary to decide this case merely with reference to the effect of the word "shall" in s. 20, sub-s. 1. That section must be read with sub-s. 2 of s. 105 of the Act, which provides that the Court may at any time adjourn any proceedings before it on such terms, if any, as it may think fit to impose; and with sub-s. 4 of the same section, which provides that the Court may extend the time for doing any act upon such terms, if any, as it may think fit to impose; and also with s. 109 of the Act, which provides that the Court may at any time, for sufficient reason, make an order staying proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just. Therefore, independently of authority, I cannot entertain any doubt that the registrar had power to do what he did in this case. But there is authority to that effect in the cases of *Ex parte McCulloch, In re McCulloch* (1) and *In re Pinfold* (2), where the expressions

(1) 14 Ch. D. 716. (2) [1892] 1 Q. B. 73.

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Lopes L.J.

used by the judges make it clear that in their opinion the word "shall" in s. 20 is not used in the sense contended for by the official receiver. Then there is the case of *In re Reed, Bowen & Co.* (1) It appears to me that what was said in that case clearly shews that the effect of s. 20, sub-s. 1, is not as contended for, but the registrar has, if there is sufficient reason for doing so, a discretion to adjourn the proceedings. Then the second question is whether, assuming that he had such a discretion, the registrar has exercised it properly in this case. I have no doubt that he has. He heard the evidence given by the debtor at his examination, and he states that the conclusion at which he arrived was that no reasonable person could doubt that it was for the benefit of all parties that there should be an adjournment.

RIGBY L.J. I agree. An important question is raised by this appeal as to the effect of s. 20, sub-s. 1, of the Bankruptcy Act, 1883. I am inclined to think that it is really the only question that is raised on the materials before us. For myself, if the terms of that sub-section stood alone, I should feel great difficulty in arriving at the conclusion at which, reading it together with s. 105, I arrive without difficulty. I should say that the word "shall" is primâ facie obligatory; but s. 105, sub-s. 2, contains a provision sufficiently wide to include a proceeding under s. 20, sub-s. 1, as well as any other proceeding under the Act. It was suggested that, where there has been a scheme of arrangement proposed which has not been accepted by the creditors, there is no power to adjourn the proceedings to enable the debtor to propose a new scheme. I think that as a general proposition it is not an unreasonable view of the meaning of s. 20, sub-s. 1, to say that under such circumstances there ought not to be an adjournment of proceedings under the section. But, though that may be the general rule indicated by the purview of the sub-section, I do not think it has the effect of laying down an absolutely hard and fast rule on the subject. I think the registrar had power to adjourn the proceedings in this case. He did not, it is true, in terms adjourn the application, which in point of form would have been, I think, the proper course to take; but, looking to the substance of the case and the question

(1) 19 Q. B. D. 174.

raised before us, I think the defect of form is not material and might be amended. It appears to me that in substance he intended to adjourn the application. The question before us really is whether in such cases there can be an adjournment. Primâ facie, I think, there ought not to be such an adjournment, but, if good cause is shewn for it, I do not see why there should not be one.

With regard to the facts of this case I feel myself under a difficulty. It does not appear to me that they have been brought before the Court sufficiently to enable me to form an independent judgment on the question whether or not there ought to have been an adjournment in this case. I think I can see the reason why this is so. The object of the appeal appears to me to have been to get a construction of s. 20, and to have it decided whether or not the registrar has under the section any discretion to order an adjournment. We are not, as it seems to me, supplied with information which would enable us to say that, if the registrar had a discretion, he exercised the discretion wrongly. In giving his decision on the application, the registrar stated that in his opinion the creditors had not really been in a position to come to a final decision on the question whether there ought to be an adjudication of bankruptcy or not. That appears to me primâ facie not an unreasonable ground for an adjournment. We know, also, that the registrar had had before him not the mere possibility of a scheme of arrangement which might be a good or bad one, but the heads of a scheme which he thought might practically be beneficial to the creditors. We have not had the opportunity of considering that scheme. As I have said, I think this question is hardly raised upon the materials brought before us, but I cannot say that there are sufficient grounds for disputing the correctness of the exercise by the registrar of his discretion.

Appeal dismissed.

Solicitor for Official Receiver: *Solicitor to the Board of Trade.*
Solicitors for debtor: *Kime & Hammond.*

E. L.

C. A.

1895

March 15.

[IN THE COURT OF APPEAL.]

IN RE LOW. EX PARTE GIBSON.

Bankruptcy—Bankruptcy Notice—Irregularity—Amendment—Notice to One of several joint Debtors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*), *s.* 143.

Upon an application to set aside a bankruptcy notice, it appeared that an action had been brought against the debtor and five other persons, and judgment recovered against the debtor and three of his co-defendants. A bankruptcy notice served on the debtor stated that the judgment had been recovered against the debtor and all the five co-defendants, but the other particulars, such as date and amount, were correctly stated:—

Held, that the defect in the notice was not material to its validity, as it could not prejudice or mislead the debtor, and that the notice could be amended under s. 143 of the Bankruptcy Act, 1883:

Held also, that, where judgment has been recovered against several persons jointly, a bankruptcy notice may be issued against one of the joint judgment debtors without including the others.

APPEAL from an order of a registrar in bankruptcy, dismissing a bankruptcy petition on the ground of the invalidity of the notice.

It appeared that an action was brought in the Chancery Division by the petitioning creditor against the debtor Low and five other persons to recover a sum of money. The amount sought to be recovered in the action was claimed against the debtor and three of his co-defendants, and other relief was asked for against the other two defendants. Judgment for the amount claimed was given against the debtor and the three co-defendants, who were sought to be made jointly liable with him.

A bankruptcy notice was issued against the debtor, founded on this judgment, and giving correctly the date and the amount recovered, but stating that the judgment was recovered against the debtor and all his five co-defendants, whose names were set out in the notice.

The registrar held that the notice was wrong, as alleging a judgment debt that did not exist, and he accordingly dismissed the petition.

The petitioning creditor appealed.

F. Cooper Willis, for the appellant. The debtor could not be misled by the notice, which sufficiently identifies the judgment on which it is founded. The case of *In re Howes, Ex parte Hughes* (1), relied on by the other side, was different, because there the debtor could not tell who were the persons to whom it was alleged he owed money, nor whether he had a counter-claim or set-off against any of them. If the defect in the notice is immaterial it ought to have been amended under s. 143 of the Bankruptcy Act, 1883.

Muir Mackenzie, for the debtor. Non-compliance with a bankruptcy notice involves the commission of an act of bankruptcy —a semi-penal consequence which makes it essential to follow strictly the forms: *In re Howes, Ex parte Hughes.* (1) The notice in this case is not founded on any existing judgment, and is therefore invalid and should be set aside. To amend the notice under s. 143 would be to create an act of bankruptcy, and no such amendment ought to be made, for the debtor ought to know, in the first instance, what the act of bankruptcy is which is alleged against him: *Ex parte Coates, In re Skelton* (2); *In re Miller.* (3)

Where there is a judgment on debt on a joint obligation the writ of execution must be joint: *Ex parte Christie, In re Barrow* (4); *Penoyer* v. *Brace* (5); *Clarke* v. *Clement.* (6) The bankruptcy notice depends on the judgment creditor's right to execution, and consequently the notice should be directed to the debtor and all the other joint judgment debtors, although it need not be served on those against whom it is not intended to proceed.

F. Cooper Willis was not called on to reply.

LORD ESHER M.R. As to the first point raised, which turns on the form of the notice, it may be true to say that there was an irregularity in the notice in the description of the judgment on which it was founded. The description gives six names of persons against whom the judgment was obtained instead of four. On the other hand, the date on which the judgment was

(1) [1892] 2 Q. B. 628.
(2) 5 Ch. D. 979.
(3) 10 Mor. 183.
(4) 1 Mont. & Bl. 352, at p. 361.
(5) 1 Ld. Raym. 244.
(6) 6 T. R. 525.

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obtained is given, and the names of the four defendants against whom it was entered. The debtor was well aware of the fact that the action was against all the six persons named, and he also knew that the judgment was against him and three of the other defendants. He could be in no doubt as to the identity of the action, and it is obvious that the point put forward to invalidate the notice was merely a formal objection, and that the defect in the notice could not work any injustice. The irregularity was unimportant and could be amended, and the notice cannot be treated as bad.

The other point raised is not one on which the notice should be set aside. It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants, although it need only be served on the one whom it is desired to make bankrupt. I fail to see what good it can do that one to have the names of the others put in the notice when there is absolutely no necessity for serving it on them. This is a technicality to which we ought not to listen.

The appeal must be allowed, and the matter referred back to the registrar to determine any questions of fact that remain open.

LOPES L.J. I am of the same opinion. I think the registrar was wrong in holding that the notice was bad. I quite agree with the opinion expressed by Bowen L.J. in *In re Howes, Ex parte Hughes* (1), that bankruptcy proceedings involve quasi-penal consequences to the debtor, and that it is essential that the forms should be strictly followed; but there is a wide distinction between defects in a notice which are material, and mere irregularities which cannot deceive the debtor or work any injustice. In my opinion, the defect in this case is of the latter kind, and could not under any circumstances embarrass the debtor or mislead him in any way. It was, therefore, one which the registrar should have amended. As to the other point, I have nothing to add to what has been said by the Master of the Rolls.

(1) [1892] 2 Q. B. 628.

RIGBY L.J. I am of the same opinion. A slip has undoubtedly been made in the bankruptcy notice, and the question is whether it is to be treated as a material defect which invalidates the notice. I do not see that any substantial injustice has been done to the person served with the notice, or that he can be in any way deceived by it. If so it ought to be amended, unless we are to say that any irregularity is sufficient to invalidate such a notice. This we cannot say without disregarding s. 143 of the statute and overruling a number of authorities.

As to the other point raised, I cannot understand why it should be obligatory on a judgment creditor to add to the bankruptcy notice the names of all the persons against whom the judgment was recovered, when it is not his intention to follow it up against any of those persons except the one whom he proposes to serve.

Appeal allowed.

Solicitors: *Faithfull & Owen; Drake, Son & Parton.*

A. M.

[IN THE COURT OF APPEAL.]

BROWN, JANSON & CO. *v.* A. HUTCHINSON & CO.

Partnership—Liabilities—Separate Debt of Partner—Judgment Creditor—Execution—Foreign Firm—Branch Office in England—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.

Sect. 23 of the Partnership Act, 1890, which enables a judgment creditor of a partner to obtain a receiver of his interest in the partnership business, applies to a foreign firm having a branch house of business in England.

APPEAL from an order of Day J. in Chambers.

The plaintiffs brought an action against J. A. Hutchinson and the firm of A. Hutchinson & Co., of which he was a member, upon a bill of exchange for 3000*l.*, drawn by J. A. Hutchinson upon and accepted by the firm, and they obtained judgment under Order XIV. against J. A. Hutchinson for 3034*l.* 17*s.*, leave being granted to the firm to defend the action. The plaintiffs then applied by summons under s. 23 of the Partnership Act, 1890, for an order charging the interest of J. A. Hutchinson in

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BROWN, JANSON & Co. v. HUTCHINSON & Co.

the partnership business with the amount of the judgment debt, and for the appointment of a receiver of his said partnership interest.

It appeared at the hearing of the summons that J. A. Hutchinson had no property which could be taken under a writ of fieri facias or elegit. It further appeared that the firm of A. Hutchinson & Co. was constituted a société en commandite according to the law of France for the manufacture and sale of india-rubber goods; that its registered office was in Paris, but that it had a branch office in London for the sale of the manufactured goods, and that this branch business was formerly managed by J. A. Hutchinson.

The learned judge granted the application.

The firm of A. Hutchinson & Co. appealed.

Bigham, Q.C., and *Tindal Atkinson*, for the appellants. Sect. 23 of the Partnership Act, 1890, is not intended to apply to a foreign firm such as that of the appellants.

J. G. Witt, Q.C., and *B. Denniss*, for the respondents. There are here really two firms, one in England and one in France, and the section applies to the firm in England. Assuming that the statutory execution provided by the Act does not apply, then the statutory protection does not apply, and the plaintiffs may have recourse to the practice which prevailed before the Act.

[They were stopped.]

Tindal Atkinson, replied.

LINDLEY L.J. stated the facts, and continued:—The Partnership Act of 1890, as is well known, made very little alteration in the legal procedure except by s. 23. Sect. 23 is absolutely new. It replaced a very cumbrous method of proceeding which had to be adopted before and even under the Judicature Act. When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a fi. fa., and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in Chancery in order to get an injunction to take an account and

pay over that which was due by the execution debtor. A more clumsy method of proceeding could hardly have grown up. In order to stop that a new method was introduced, which is explained and indicated in s. 23. Clause 1 says, "After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm." That puts a stop at once to all such proceedings as I have been alluding to. The sheriff cannot now go and seize the property of the firm if a debt is due by one of the partners only. That is absolutely stopped.

Then the second part of that section really recasts the whole of the procedure which formerly prevailed with regard to the mode of ascertaining the amount due by the judgment debtor: "The High Court or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon." What is the effect of that? That has no immediate effect on the co-partners at all. It simply amounts to this—that the interest of their co-partner in the business is charged just as if he had given an equitable charge over his interest. It does not harass or affect the other partners in the least. Then, in order to give effect to that charge, provision is made for the appointment of a receiver of that partner's share and profits. The effect of that is that the appointment of a receiver operates as an injunction against the execution debtor receiving anything from his co-partners, and if his co-partners pay over to him anything with knowledge of the appointment of the receiver they may get into trouble. But then that does not produce money, except money which the co-partners may hand over, or could hand over to the judgment debtor partner if it were not for the receiver. In order to get the full benefit of the charge, the section proceeds: "The Court may direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been in favour of the judgment creditor by the partner, or which the circumstances of the case may require."

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Lindley L.J.

That means this—that an order may be made to take an account of what is due from the co-partners to the judgment debtor partner, and there is a clause (s. 33, sub-s. 2) which enables the solvent partners to treat that as a dissolution. There is a clause which enables the solvent partners to proceed, if they think fit, to get rid of the judgment debtor. That is the machinery provided.

Now, that is intended unquestionably to supersede the old practice; and whenever there is a firm, I do not care how it is constituted, carrying on business here with assets which the sheriff could seize under the old practice, this section is applicable.

That is the case here. Mr. J. A. Hutchinson carries on business over here under the name of A. Hutchinson & Co., with or without the foreign members, and there are assets in that place of business, which is a branch place of business, which assets the sheriff could seize under the old practice. I think there is ample jurisdiction to make this order, and I do not think it will prejudice or affect the foreign partners at all, unless, indeed, they came over here and insisted upon handing over to the judgment debtor the money which they ought to hand over to the receiver; and the receiver cannot go to Paris and enforce this order. Neither does it authorize the receiver to receive partnership assets. He has no business to locate himself in this branch of business and stop there. All he can do is to give notice to the other partners about payments to the judgment debtor. But as regards the judgment debtor, the appointment of a receiver is extremely important, because if he, in violation of this order, receives anything from his co-partners and the receiver finds it out, he can order him to hand it over. The judgment creditor need not bring an action against him; he can get a four-day order enforcing obedience by a speedy process. It appears to me, therefore, that there is jurisdiction to make this order, that the order is right, and that this appeal proceeds on a theory that it has a much greater effect than it has. It has no effect at all abroad. I may add, for the satisfaction of the appellants, that if they choose to pay off the judgment creditor they can do so under clause 3 of s. 23. I think that this appeal must be dismissed with costs.

A. L. SMITH L.J. It is said that the order of Day J. ought not to have been made because he had no jurisdiction to make it. It is said he had no jurisdiction because the firm of A. Hutchinson & Co. is a foreign firm and not an English firm, and therefore s. 23 of the Act of 1890, under which the proceedings were taken before Day J., has no application, because that section only applies to a firm which exists either in England or Ireland. It is expressly provided that that section does not apply to Scotland. But, in my opinion, on the materials before us, the allegation that this is a foreign firm, and not a firm carrying on business in this country, is displaced. Then a point was taken by counsel for the respondents which is fatal to the appellants' case—namely, that if this is not a partnership within s. 23, then the sheriff can go and seize all the goods in the London office according to the old practice. It seems to me that if the appellants are right in saying that this is a partnership to which the Act does not apply, the old remedy is left. But that is impossible. In my judgment, in a case like the present, where there is a partnership carrying on business partly in England and partly in France, that is a carrying on of the business of a partnership in this country within the purview of the section. Therefore, it appears to me that the order of Day J. was quite right. I agree that the receiver has no power to intermeddle with the business in France. His only duty is to receive the money which otherwise would be paid over to the judgment debtor. I think that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellants: *H. Montagu.*

Solicitors for respondents: *Hays, Schmettau, & Ancrum.*

H. C. J.

C. A.
1895
March 7.

[IN THE COURT OF APPEAL.]

DYER AND WIFE *v.* MUNDAY AND ANOTHER.

Master and Servant—Criminal Act done by Servant in course of his Employment—Responsibility of Master—Conviction of Servant—Release from Civil Proceedings for the same Cause—Effect on Master's Liability—The Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 45.

The defendant employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in the plaintiff's house, and, on one of the instalments being in arrear, went to the house and removed the furniture. While so doing he assaulted the plaintiff. For this assault he was summoned, convicted and fined, and he paid the fine. In an action against the defendant in respect of the assault the jury found that the manager committed the assault in the course of his employment:—

Held, that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant, and that the release of the servant, under 24 & 25 Vict. c. 100, s. 45, from civil proceedings for the assault, did not release the defendant from liability.

APPLICATION by the defendant Munday for judgment or a new trial in an action tried by Lawrance J. with a jury.

The action was brought against Munday and his co-defendant Price to recover damages for forcibly breaking into the plaintiff Dyer's premises and assaulting the female plaintiff and carrying off a bedstead, the property of the plaintiff Dyer. The circumstances under which the action arose were that Munday carried on the business of a furniture dealer on the hire-purchase system, and Price was manager of a branch establishment. Price made an agreement with one Styles with respect to a bedstead for which the latter was to pay by instalments. Styles lodged in the plaintiff's house, and, being in arrear with his rent, pledged the bedstead to his landlord. Price, finding that one of the instalments due on the bedstead was in arrear, went to the house with an assistant, and when the door was opened by Mrs. Dyer pushed his way in. He then proceeded to remove the bedstead, and his doing so was opposed by Mrs. Dyer, who alleged that she had been assaulted by Price and his assistant. For this

assault they were summoned, when both were convicted and fined, and the fines paid. This action was then commenced, claiming the return of the bedstead and damages for its detention, and damages for the trespass and assault. The defendants denied the trespass and assault and claimed the bedstead as the property of Munday, and they contended that under 24 & 25 Vict. c. 100, s. 45, the conviction of Price prevented the action being maintained for assault against either defendant, and one shilling was paid into Court in respect of the trespass.

In answer to questions by the learned judge the jury found that the bedstead was pledged with Dyer as security for rent; that there was a trespass by Price and his assistant, and that there was an assault by them. Damages for the trespass were assessed at 25*l.*, and for the assault at 15*l.* The jury also found that the trespass and assault were committed by Price and his assistant in the course of their employment by Munday. Judgment was entered accordingly for the return of the bedstead, and against both defendants in respect of the trespass, and in respect of the assault against the defendant Munday. The defendant Munday now applied that judgment should be entered for him or a new trial ordered.

Montague Lush, for the defendant Munday. So far as the assault is concerned, both defendants were released from further liability by virtue of the provisions of 24 & 25 Vict. c. 100, s 45. (1) By that section the conviction of Price released him from liability to an action. Munday committed no tortious act himself, and was only responsible by virtue of the relation between him and the servant. It cannot have been intended that he should remain liable, although the servant's liability is at an end. If the servant had been sued for the assault, and

(1) 24 & 25 Vict. c. 100, s. 45: "If any person, against whom any such complaint as in either of the last three preceding sections mentioned (for assault or battery) shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate (of the dismissal of the complaint), or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

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damages recovered against him, the master could not afterwards have been sued, even although the judgment against the servant had not been satisfied. The effect of the statute is to give an option to the person aggrieved to bring an action or to proceed criminally against the servant; and, if he does the latter, it has the same effect on the liability of the master as if an action had been brought and judgment recovered against the servant. If the person assaulted had, in the first instance, sued the master and recovered judgment against him, the master could have sued the servant for indemnity. If the contention of the plaintiff is correct, the master would be deprived of this right, for the statute releases the servant from all civil procedure at the instance of every person: *Masper* v. *Brown.* (1) [He cited also *Thurman* v. *Wild.* (2)]

With regard to both the trespass and assault, the defendant is not liable, because the acts complained of were not authorized by the defendant or done within the scope of the servant's employment: *Freeman* v. *Rosher* (3); *Lyons* v. *Martin.* (4) It was not within the scope of his employment to trespass on the property of persons other than the hirer in order to get back goods let out on the hire-purchase system; still less to commit a criminal act such as an assault. It is impossible that Price and his assistant could have thought that they had any such right, or were doing these wrongful acts under the authority or in the interest of their master. If Munday is liable in this case he would equally be liable if his servant, being unable to recover the bedstead, had taken any property of the plaintiff's that he could lay hands on in order to make up the loss to his master. The act done was not merely an unlawful act outside the scope of the servant's authority, but was a criminal act for which the master cannot be made liable unless he directly authorized it. [He cited *Goff* v. *Great Northern Ry. Co.* (5); *Seymour* v. *Greenwood* (6); *Poulton* v. *London and South Western Ry. Co.* (7);

(1) 1 C. P. D. 97.
(2) 11 A. & E. 453.
(3) 13 Q. B. 780.
(4) 8 A. & E. 512.
(5) 3 E. & E. 672; 30 L. J. (Q.B.) 148.
(6) 6 H. & N. 359, 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.
(7) Law Rep. 2 Q. B. 534.

Edwards v. *London and North Western Ry. Co.* (1); *Allen* v. *London and South Western Ry. Co.* (2); *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3); *Bolingbroke* v. *Swindon Local Board* (4); *Richards* v. *West Middlesex Waterworks Co.* (5)]

Shearman, for the plaintiffs. In agreements under the hire-purchase system, the thing sold can be reclaimed when any instalments are unpaid, and it was obviously the duty of Price to take steps to get possession of the bedstead. He went to the plaintiff's house for that purpose, and in carrying it out he used violence. The act was not done by the authority of the master; but that is not material, for it was done in the course of the employment of the servant, and not from any private interest of his own, but in the interest of the master. There is no authority for the suggested difference between criminal and other tortious acts done by a servant in so far as the effect on the liability of the master is concerned, and there are a number of cases in which a master has been held liable for an assault committed by his servant.

The statute which exempts the defendant Price from civil liability for the assault applies in terms only to the person charged, and cannot affect the liability of any other person. [He cited *Limpus* v. *General Omnibus Co.* (6), *Barwick* v. *English Joint Stock Bank* (7), and *Houldsworth* v. *City of Glasgow Bank.* (8)]

Montague Lush, in reply.

LORD ESHER M.R. In this case an action has been brought, one object of which is to make the defendant Munday liable for an assault and trespass. The motion before us is to ask us to say that there was nothing to leave to the jury. How does this question shape itself? It is not whether there was any misdirection on the part of the learned judge, but whether there was evidence on which the judge might leave the case to the

(1) Law Rep. 5 C. P. 445.
(2) Law Rep. 6 Q. B. 65.
(3) Law Rep. 7 C. P. 415; 8 C. P. 148.
(4) Law Rep. 9 C. P. 575.
(5) 15 Q. B. D. 660.
(6) 1 H. & C. 526; 32 L. J. (Ex. 34.
(7) Law Rep. 2 Ex. 259.
(8) 5 App. Cas. 317.

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jury on a proper direction, that is, on such a direction as was approved of by the judges in *Limpus* v. *General Omnibus Co.* (1) Under such a direction the judge would ask the jury whether it was part of the duty of the defendant Price to let out furniture on behalf of his master on the hire principle, and, moreover, to see that as soon as any instalment was not paid, possession of the furniture should be resumed. The question, therefore, for the jury was whether Price was employed to get back the bedstead, and did the acts complained of for the purpose of furthering that employment, and not for private purposes of his own: and there was evidence on which they might find as they have done.

Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the case out of the rule which makes the master liable for the acts of his servant. But if we look at *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2) and *Seymour* v. *Greenwood* (3), it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part of the excess was criminal the master was exempt from liability, and in view of that fact the proposition put before us will not hold good. I do not at all say that the criminal act may not be of such a character as to induce the jury to say that it could not have been done in furtherance of the master's business, or at all in the interests of the master. It may well be that the question whether the offence is a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offence is not sufficient to take the case out of the general rule. The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. There was evidence in this case on which the jury might be properly asked to give their opinion.

As to the statute, it is suggested that the release of Price from liability to a civil action releases Munday. What we have

(1) 1 H. & C. 526; 32 L. J. (Ex.) 34. (2) Law Rep. 8 C. P. 148.
(3) 6 H. & N. 359, 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.

to do is to construe the statute, and, taking the words of the statute, it is clear that they fall short of saying that the relief afforded to Price is to operate as relief to Munday. The appeal fails and must be dismissed.

LOPES L.J. I am of the same opinion. With regard to the statute, the words used plainly indicate that it was intended that the relief afforded should apply only to the person charged. The civil remedy which existed up to that time is affected, but only so far as the person charged is concerned, and remedies against other persons are not touched.

As to the other point, it is said that there was no evidence on which the judge could rightly leave to the jury the question whether Price was acting within the scope of his employment. I think that there was such evidence, and that the jury might very reasonably come to the conclusion that Price, as general manager for Munday, had, as part of his duty, to obtain possession of the bedstead directly the instalments became in arrear. If so, the jury might also fairly consider that in order to carry out that employment with which he was entrusted Price committed the assault complained of.

The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded. The point was taken that although that proposition might be true as to tortious acts it was not as to criminal acts; but the cases of *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) and *Seymour* v. *Greenwood* (2) dispose of that contention. There is no distinction in this respect between the effects of a tortious and a criminal act, provided such acts are done by the servant in the conduct of his employment and in the interest of his master.

RIGBY L.J. Sect. 45 of 24 & 25 Vict. c. 100, alters the common law in this respect, that if a person who is charged with an assault obtains a certificate of the discharge of the complaint,

(1) Law Rep. 8 C. P. 148.
(2) 6 H. & N. 359, 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.

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or if convicted pays the amount adjudged to be paid, or suffers imprisonment, he is released from all further proceedings, civil or criminal, for the same cause. It is said that this should be read as if the Act said that the statutory release given by it should have the same effect as a release by agreement of the parties. I can find nothing to that effect in the Act, and we have no right to interpolate anything giving that effect to the Act.

As to the other point raised in this appeal, it seems to me that some confusion has arisen, owing to the use of different expressions which in my opinion mean the same thing. If the expression "scope of authority" means "authority," the case would be different; but it seems to me that it has exactly the same meaning as the expression "course of employment," and the act complained of must be done in the course of the employment of the person doing it, though it may be beyond any authority actually given to him. The law on the matter was laid down by Willes J. in *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1): "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment." I can find no authority for distinguishing in the application of this rule between tortious and criminal acts of the servant. The class of acts to be done by the manager in the case before us was the resumption of furniture in respect of which instalments were unpaid, and it was left to him to determine when such an act should be done and the manner in which it should be done. It was therefore immaterial whether, in the course of doing one of this class of acts, the manager acted in accordance with the

(1) Law Rep. 7 C. P. 415, at p. 420.

instruction of his employer or not. The case was a proper one to be left to the jury, and the appeal must be dismissed.

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Appeal dismissed.

Solicitors for plaintiffs: *Shearman & Rayner.*

Solicitor for defendants: *O. H. Swann.*

A. M.

Applied. CHANDRIS *v.* ISBRANDTSEN-MOLLER CO. INC. [1950] 1 All E.R. 768.

Applied. CHANDRIS *v.* ISBRANDTSEN - MOLLER INC. [1951] 1 K. B. 240

[IN THE COURT OF APPEAL.]

C. A. 1895 *Feb.* 21, 22.

ANDERSON *v.* ANDERSON.

Deed—Construction—General Words—"Ejusdem Generis."

When in the operative part of a deed general words follow an enumeration of particular things, those words are primâ facie to be construed as having their natural and larger meaning, and are not to be restricted to things ejusdem generis with those previously enumerated, unless there is something in the deed which shews an intention so to restrict them.

By a post-nuptial settlement made by a husband upon his wife he demised to the trustees a leasehold messuage and premises, particularly described in a schedule, and he assigned to them "all the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits and other consumable stores, and other goods, chattels, and effects in, or upon, or belonging to" the leasehold messuage. In the schedule the leasehold premises were described as a piece of ground, "with the messuage, tenement, or dwelling-house, back buildings, coach-houses, stable buildings, and all other erections thereupon":—

Held, that under the general words "other goods, chattels and effects" there passed to the trustees the carriages, horses, harness, and stable furniture in or upon the coach-houses and stable buildings.

THE plaintiff was the widow of Arthur Anderson, who died on February 28, 1894; the defendants were the executors of his will; and the trustee of a post-nuptial settlement executed by the deceased on October 21, 1886.

By her statement of claim the plaintiff claimed a declaration that on February 28, 1894, she became entitled to certain horses, carriages, harness and stable furniture, and to a sum of 930*l.* 6*s.*, the proceeds of the sale thereof by agreement, which had been deposited in a bank.

By the settlement of October 21, 1886, Arthur Anderson, as settlor, demised unto two trustees the leasehold messuage and premises particularly described in the first schedule thereto,

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with their appurtenances, to hold the said premises unto the trustees, their executors and assigns, for the residue of the term for which the same premises were holden, except the last day thereof, upon the trusts thereinafter mentioned. And, in further consideration of the premises, A. Anderson, as settlor, thereby assigned and conveyed unto the trustees, their executors, administrators, and assigns, "First, all and singular the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits, and other consumable stores, and other goods, chattels, and effects in or upon or belonging to the said leasehold messuage hereinbefore demised, or its appurtenances, including the pictures and statuary specified in the second schedule hereunder written, and also all household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits, and other consumable stores, pictures, statuary, works of art, and other goods, chattels, and effects which shall or may at any time or times during the joint lives of the said A. Anderson and the plaintiff, be brought into or upon the aforesaid messuage and premises, or be appropriated to the use thereof, either in addition to or in substitution for the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits, and other consumable stores, pictures, statuary, works of art, and other goods, chattels, and effects now being therein or belonging thereto, and expressed to be hereby assigned and conveyed," to hold all and singular the premises thereinbefore expressed to be thereby assigned and conveyed unto the trustees, their executors, administrators, and assigns, upon the trusts thereinafter mentioned. The trusts of the settlement were, to permit the wife, during the joint lives of her husband and herself, to have the occupation, use, and enjoyment of the trust premises, for her separate use without power of anticipation, and, upon the death of either of them, to convey and assign the trust premises to the survivor absolutely.

In the first schedule to the deed the leasehold messuage and premises were described as "all that piece or parcel of ground, with the messuage, tenement, or dwelling-house, back building, offices, coach-houses, stable buildings, and all other erections thereupon built, and known as No. 43, Wimpole Street."

After the death of her husband the plaintiff claimed to be entitled under the settlement to the horses, carriages, harness and stable furniture, which at the time of his death were in, or upon, or belonging to the coach-houses and stable buildings mentioned in the first schedule to the deed. The executors of the husband's will disputed this claim, and this action was brought to determine the question. By arrangement the articles in question were sold by the executors, and the proceeds of sale, which amounted to 930*l.* 6*s.*, were deposited in a bank.

Wright J. held that the articles in question passed to the plaintiff under the words "all other goods, chattels, and effects," and that she was entitled to the proceeds of sale.

In the course of his judgment the learned judge said:—It appears to me that the only rule to be gathered from the cases, so far as I have seen them, is this—you may shew, either by the subject-matter of the instrument or by the context, that a particular word is used in such a way as either to exclude some class of things which would naturally fall within it or to include some class of things which would not naturally fall within it. If you cannot do that, I apprehend that you must adhere to the natural meaning of the word. In the present case it seems to me that there is nothing to indicate that any species of chattel which may be in or upon the demised premises, and which is of what I may call individual utility, is to be excluded. I cannot see any rule which would justify me in saying that the articles in question, which are primâ facie "chattels and effects in or upon the premises" (that is, upon the coach-house and stables), ought to be regarded as not within the settlement. I therefore give judgment for the plaintiff, with costs.

The executors appealed.

Horne Payne, Q.C., and *Bremner*, for the plaintiff. In many cases general words following an enumeration of particular things have been limited to things ejusdem generis with those previously specified, and this limitation ought primâ facie to be placed upon general words: Williams on Executors, 9th ed., p. 1045, et seq.; *Manton* v. *Tabois* (1); *Hotham* v. *Sutton* (2);

(1) 30 Ch. D. 92.

(2) 15 Ves. 319.

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Arnold v. *Arnold* (1); *Roberts* v. *Kuffin* (2); *Swinfen* v. *Swinfen*. (3)

[RIGBY L.J. referred to *King* v. *George*. (4)

LOPES L.J. referred to *Lewis* v. *Rogers* (5); *Kennedy* v. *Keily*. (6)]

The general words should be limited to articles proper for the furnishing and decorating of a dwelling-house.

Crackanthorpe, Q.C., and *G. Spencer Bower*, for the plaintiff. The general words ought to receive their full and natural meaning. General words are not to be limited to things ejusdem generis with particulars previously enumerated, unless a plain intention is to be found so to restrict their meaning: *Parker* v. *Marchant*. (7) In this case, as the coach-houses and stables are comprised in the settlement, "goods, chattels, and effects" in the coach-houses and stables are also included, and the only reasonable construction is that those words include the chattels which would generally be found in coach-houses and stables, namely, carriages, horses, and harness.

[They referred also to *Gibbs* v. *Lawrence*. (8)]

Horne Payne, Q.C., in reply, referred to *Newman* v. *Newman* (9) and *Gower* v. *Gower*. (10)

LORD ESHER M.R. The question we have to decide is, whether this voluntary settlement included the horses, carriages, harness, and stable furniture which were in the stables and coach-house at the time of the settlor's death. On the part of the plaintiff it is said that the general words "other goods, chattels, and effects," taken in their ordinary sense, will include those things. On the part of the executors it is said that the meaning of the general words ought to be limited by virtue of the doctrine which is known as that of ejusdem generis. No doubt many cases are to be found in the reports in which the meaning of general words in deeds or wills has been thus limited. But I am not surprised to find that the modern tendency of the Courts

(1) 2 My. & K. 365.
(2) 2 Atk. 112.
(3) 29 Beav. 207.
(4) 4 Ch. D. 435; 5 Ch. D. 627.
(5) 3 L. J. (N.S.) (Ex.) 326.
(6) 28 Beav. 223.
(7) 1 Y. & C. Ch. 290.
(8) 30 L. J. (Ch.) 170.
(9) 26 Beav. 220.
(10) Amb. 612.

has been to construe general words in their ordinary sense. It cannot, however, be doubted that there are cases in which such words must be construed in a limited or restricted sense, and the question is how the rules of construction are to be applied. I will take first the rule as stated by Lord Eldon in *Church* v. *Mundy*. (1) He said: "the best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary." That is, as I understand him, primâ facie you are to give the words their larger meaning, unless you find something which plainly shews that they were intended to be read in a more restricted sense.

Then, again, Knight Bruce V.C. in *Parker* v. *Marchant* (2), said (at p. 300): "The words 'goods, chattels, and effects,' which the bequest contended to be residuary contains, or any of them, are terms that, in their proper sense and nature, are sufficiently large to include and pass the absolute interest in the whole personal estate. But a will may be so worded as to shew that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense; and when this appears the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction to shew that a rational interpretation of the will requires a departure from that which ordinarily and primâ facie is the sense and meaning of the words."

Nothing can well be plainer than that to shew that primâ facie general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before.

In the present case the words are "other goods, chattels, and effects in or upon or belonging to the said leasehold messuage hereinbefore demised, and other goods, chattels, and effects, which shall or may, at any time or times during the joint lives, be brought into or upon the aforesaid messuage and premises,"

(1) 15 Ves. 396, 406. (2) 1 Y. & C. Ch. 290.

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and, then, in the schedule, the leasehold messuage is described as including the coach-house and stable buildings. The words "goods, chattels, and effects" in the coach-house and stables would in their ordinary sense include the carriages, horses, harness, and stable furniture there. Is there anything in the deed which shews that these general words were intended to be limited to things ejusdem generis with "household furniture, plate, linen, &c.," which are previously specifically mentioned? I cannot find anything which shews such an intention. On the contrary, when you find a man making such a settlement as this upon his wife, and clearly giving her "goods, chattels, and effects" in the coach-house and stables, I think it would be absurd to come to any other conclusion than that he intended to give her all those goods, chattels, and effects which would generally be found in the coach-house and stables, namely, the carriages, horses, and harness. I think the general words were intended to bear their natural and larger meaning. I entirely adopt the canon of construction which was laid down by Knight Bruce V.C. in *Parker* v. *Marchant* (1), and I reject the supposed rule that general words are primâ facie to be taken in a restricted sense. The appeal must be dismissed.

LOPES L.J. The schedule to the settlement shews that the leasehold messuage which is demised to the trustees was intended to comprise the coach-house and stables attached to it. Then there is assigned to the trustees "all the household furniture, plate, linen, china. &c., and other goods, chattels, and effects in, upon, or belonging to the said leasehold messuage." This clearly means "in, upon, or belonging to" the dwelling-house and the coach-house and stables, and, therefore, the general words would naturally include the carriages, horses, and harness in the coach-house and stables. It is said that the general words ought to be restricted to things ejusdem generis with the household furniture, &c., which have been previously enumerated. In my opinion this is not so. If an intention is shewn by a settlor or testator to restrict in this way the meaning of general words which he uses, then, no doubt, effect should be given to

(1) 1 Y. & C. Ch. 290.

his intention, but in the absence of any such manifestation of intention the words ought to receive their natural meaning. I cannot doubt that in the present case the settlor intended the carriages and horses and harness to go to his wife, and, in my opinion, the general words ought not to be restricted to things ejusdem generis with those previously enumerated. The doctrine of ejusdem generis is a very valuable servant, but it would be a most dangerous master. I entirely agree with the judgment of the Master of the Rolls.

RIGBY L.J. I construe this document in the same way. The doctrine known as that of ejusdem generis has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied: it has been one doctrine throughout. The main principle upon which you must proceed is, to give to all the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to shew that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough. One need not travel beyond the case of *Parker* v. *Marchant* (1) to find great authority for that proposition—I mean not only the authority of the case itself, which is deservedly high, but other authorities which are cited in it. Lord Eldon, Lord Cottenham, Sir William Grant, Sir John Leach, and Knight Bruce V.C. himself, all lay down the rule to the effect which I have stated—you must give the words which you find in the instrument their general meaning, unless you can see with reasonable plainness that that was not the intention of the testator or settlor. We must look at the

(1) 1 Y. & C. Ch. 290.

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surroundings. In the present case the settlor was a gentleman who had an establishment consisting of a leasehold messuage—a term in itself of very wide extent; but it is not necessary to rely upon that, because the schedule to the deed shews that the term was intended to comprise in addition to the dwelling-house the coach-house and stables. Under these circumstances it is reasonably clear that the settlor intended the settlement to include, and that his wife, if she survived him, should have the benefit of, the whole establishment as it was being carried on—the house and everything necessary for the use and convenience of the house; the other buildings, including the coach-house and stables, with everything necessary for the use and convenience of those buildings. To attribute to him that he consciously intended that the stables and coach-house should be stripped of everything which was in them, and left in a condition in which they could not be used, unless a considerable expenditure was incurred by the wife when she came into possession, would, I think, be rather extravagant.

But let us look at the words themselves and the recitals. The general rule no doubt is, that the recitals cannot be referred to for the construction of the operative words of a deed, unless there is something so ambiguous in the operative words that you must go there to clear the matter up; but in the recitals in this case I find an anxious introduction of general words to the same effect as those which occur in the operative part. And when we come to the operative words themselves, I find that, as regards the dwelling-house, everything necessary for the use and convenience of the dwelling-house was plainly intended to be assigned. No doubt as regards the coach-house and stables there is not any enumeration of particulars, but, applying in a reasonable way the doctrine of ejusdem generis, we find perfectly general words, which will easily bear the most extensive meaning that can be put upon them. The settlor has not told us exactly what is to be done as regards the stables, but he has sufficiently shewn what he intended. And, even on the doctrine of ejusdem generis, properly applied, I should consider that everything necessary for the reasonable use and convenience of the coach-house and stables would be included.

But I may go a little further, and say that in this case it was clearly intended that the general words should have their ordinary meaning, and that the expression of particulars was not intended to cut down the general words, but to make it as plain as could be that the settlor intended the most general effect to be given to all the words. Whether, therefore, we consider that the case falls within the doctrine of ejusdem generis, or that it does not, I think we must come to the same conclusion, namely, that everything for the use and convenience of the stables and coach-house was intended to be included in the settlement.

With regard to *Hotham* v. *Sutton* (1), which was much relied upon by Mr. Horne Payne, Lord Eldon was there dealing with very special words. The word "effects" has been often held to have a very restricted meaning, and in that case Lord Eldon said (at p. 326): "The doctrine appears now to be settled in this Court, that the words 'other effects' in general mean effects ejusdem generis." But, curiously enough, in that very case he decided that the word "effects" must have a meaning larger than its common meaning, and that, by reason of the express exception of money, the word passed all the testator's personal estate, except money and bank notes.

Appeal dismissed.

Solicitors: *Ashurst, Morris & Co.; Lindo & Co.*

(1) 15 Ves. 319.

W. L. C.

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[CROWN CASE RESERVED.]

THE QUEEN *v.* MUNSLOW.

Criminal Law—Libel—Sufficiency of Indictment—Omission of Averment that Publication was "Malicious"—The Libel Act, 1843 (6 & 7 *Vict. c.* 96), *s.* 5.

By 6 & 7 Vict. c. 96, s. 5, "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the court may award, such imprisonment not to exceed the term of one year."

An indictment charged the defendant with "unlawfully" publishing a defamatory libel, but omitted to aver that it was published "maliciously":—

Held, that the section did not create or define an offence, but merely enjoined the punishment to be awarded to an existing common law offence; that at common law an averment of malice was unnecessary, and the indictment was therefore good.

Semble, that if an averment of malice had been necessary, the defect would have been cured by verdict as being an imperfect averment.

CASE stated for the opinion of the Court by Cave J.

The defendant was tried at the Warwick Assizes upon an indictment for libel under 6 & 7 Vict. c. 96, s. 5. The indictment contained three counts, each setting out a separate libel; the language of each count, so far as it affected the question of law raised, was identical, and for the purpose of the case it was only necessary to set out the material words of the first count, which were as follows: "The jurors for our lady the Queen upon their oath present that George Munslow unlawfully did write and publish a certain defamatory libel of and concerning Henry Truslove according to the tenor and effect following, that is to say" (here followed the specific words of the libel complained of). The prisoner pleaded not guilty; whereupon his counsel applied to quash the indictment on the ground that it did not contain any averment that he published the libels or any of them maliciously, and therefore did not sufficiently disclose any offence under the section. The application was refused, and the case proceeded, and, the defendant having been convicted on all the counts, his counsel again raised the same point by way of arrest of judgment. The learned judge postponed sentence, and admitted the defendant to bail pending the hearing of this case.

The question for the opinion of the Court was whether judgment ought to be arrested on the ground taken by the defendant's counsel.

Stanger, for the defendant. The indictment is bad, for an averment that the libel was published maliciously is essential where an offence is charged under s. 5. This appears from a comparison of the language of that section with that of the two preceding sections: in s. 3 the word "maliciously" is omitted, the offence being publication "with intent," and the intent supplies the malice; but where no intent is alleged, and the offence is that of publishing a defamatory libel, knowing it to be false, as provided for in s. 4, the word "maliciously" is inserted.

[LORD RUSSELL C.J. Section 5 seems merely to enact the punishment for the offence of malicious libel, and not to define the offence.]

It is not every publication that is a malicious publication, and the section seems to define or describe the offence by making a malicious publication essential.

[CHARLES J. The word "unlawfully" being in the indictment, may it not be treated as an imperfect averment and cured by verdict?]

Not if malice is an essential ingredient of the offence, for the total omission of a necessary averment cannot be cured by verdict: *Reg.* v. *Aspinall* (1); *Reg.* v. *Mayor, &c., of Poole.* (2)

[LORD RUSSELL C.J. An offence under s. 5 seems to be simply a common law offence, and in proceedings, whether civil or criminal, for publication of a defamatory libel, an allegation that it was published "maliciously" is unnecessary: *Rex* v. *Harvey* (3); *Bromage* v. *Prosser.* (4)]

Malice must be found by the jury before they can convict the accused, and as it is necessary to be proved, it must be alleged in the indictment; it is true that it may be proved by inference from the proof of publication, which is primâ facie evidence of malice and must be disproved by the accused; but that is a

(1) 2 Q. B. D. 48.
(2) 19 Q. B. D. 602.
(3) 2 B. & C. 257.
(4) 4 B. & C. 247.

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question of evidence, and does not affect the description of the offence in the indictment. The question is not affected by 14 & 15 Vict. c. 100, s. 24, which provides that indictments are not to be held insufficient for want of the averment of any matter "unnecessary to be proved."

Hugo Young, for the prosecution. Assuming that a malicious publication, being a matter necessary to be proved, should have been alleged in the indictment, a finding of malice was necessarily involved in the verdict of the jury, and the absence of the averment in the indictment has been cured by verdict: *Heymann* v. *Reg.* (1) But the indictment was good, for it is clear that at common law malice need not be alleged in an action to recover damages for libel or slander: *Mercer* v. *Sparks* (2), approved in *Bromage* v. *Prosser* (3); and where there is a question of pleading at common law there is no distinction between the pleadings in civil and criminal cases: per Blackburn J. in *Heymann* v. *Reg.* (4)

[He was stopped by the Court.]

Stanger, in reply.

[The following additional authorities were referred to by the Court or by counsel during the arguments: *Reg.* v. *Harvey* (5); *Rex* v. *Cox* (6); *Rex* v. *Davis* (7); *Rex* v. *Turner* (8); *Rex* v. *Ryan* (9); *Reg.* v. *Goldsmith* (10); *Rex* v. *Abingdon* (11); *Emmens* v. *Pottle* (12); Archbold's Criminal Pleading (21st ed.), pp. 69–73.]

LORD RUSSELL of KILLOWEN C.J. This indictment charges the defendant in each count with having unlawfully written and published a defamatory libel, the word "maliciously," which is commonly used in such indictments, being omitted; had the words "unlawfully and maliciously" been employed, the case would not now be before us. For myself, I must say that, in my opinion, it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. How-

(1) Law Rep. 8 Q. B. 102.
(2) Noy, 35.
(3) 4 B. & C. 247.
(4) Law Rep. 8 Q. B. at p. 105.
(5) Law Rep. 1 C. C. 284.
(6) 1 Leach, 71.
(7) 1 Leach, 493.
(8) 1 Moo. C. C. 239.
(9) 2 Moo. C. C. 15.
(10) Law Rep. 2 C. C. 74.
(11) 1 Esp. 226.
(12) 16 Q. B. D. 354.

ever, an objection was taken before the case went to the jury, which was in effect that the indictment was bad, and the question for us to consider is whether it was bad. That the case was intended to be presented to the jury as being within s. 5 of the Libel Act, 1843, is clear: it was so presented to them; but how and for what purpose? What is the true effect of the section? It provides that if any person maliciously publishes a defamatory libel he shall, being convicted thereof, be liable to fine or imprisonment or both; the section does not therefore, as its language shews, create a new offence, nor does it purport to give a definition of an existing offence; but it provides for the application to that which was already an offence at common law of the appropriate punishment on conviction for that offence. It follows, therefore, that cases in which the offences dealt with are the creations of statute and are defined by particular statutory language, many of which have been cited to us, have no pertinence to the point raised before us to-day. The word "maliciously" was introduced into the section in order to prevent the section working great injustice. Any one who publishes defamatory matter of another tending to damage his reputation or expose him to contempt and ridicule is guilty of publishing a defamatory libel, and the word "maliciously" was introduced in order to shew that, though the accused might be primâ facie guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge. For example, upon the production of the alleged libel, it is for the judge to determine whether it is capable of being regarded as a libel by the jury; his function is then ended, and if the jury determine it to be a libel, then, in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to shew that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word "maliciously."

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Here the case went to the jury after the objection was taken, and we must assume that the language was capable of bearing the innuendoes placed on it and was capable of being a libel, that the jury found that it was in fact a libel, and that there was no lawful excuse, such as privilege, for its publication. In that state of facts, is the prisoner to be absolved from the consequences of the verdict, and is the conviction to be quashed merely because the word "maliciously" has been omitted from the indictment? The argument for the defendant is in effect that the indictment is an indictment under the statute, and is in respect of an offence under the statute; but, in my judgment, that is a mistaken view; the indictment is for a common law offence, but is so framed as to bring it within the section for the purpose of punishment. If that is so, is the indictment bad for omitting the word "maliciously"? It is common ground that the rules of pleading in civil and criminal cases do not differ; if, therefore, the authorities shew that in an action for libel the declaration is good on demurrer, although the word "maliciously" is omitted, that would be an authority for holding that an indictment is not bad by reason merely of omitting it. No doubt the law implies malice from the publication of defamatory matter; but that implication, as I have already said, may be rebutted.

The first authority to which I need refer is *Rex* v. *Harvey*. (1) In that case the defendants were indicted for a libel imputing mental insanity to George IV., and though the point was not taken upon an objection to the indictment, the language of the judges upon a motion for a new trial on the ground of misdirection throws light upon the subject. The jury at the trial required to know from the Lord Chief Justice whether it was necessary that there should be a malicious intention in order to constitute a libel, and the answer given was: "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary." Upon the motion for a new trial, Bayley J. said that, in

(1) 2 B. & C. 257.

his opinion, the direction was right, and that the falsely making the assertion made by the defendants was evidence that they made it maliciously. The language of Holroyd J. is more direct as to the necessity of an allegation of malice. He says: "It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable"; and again: "It appears, therefore, that it was not absolutely essential to aver malice in this indictment, or to prove it at the trial; but it is unnecessary to discuss that point, because I think that, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury." The proof required at the trial would be the production and proof of publication of a libel of such a nature that the law would infer malice from the fact of its publication.

That case was followed by *Bromage* v. *Prosser* (1), which was an action of slander; but on this point there is no difference between actions for slander and for libel. In delivering the judgment of the Court, Bayley J. says: "If in an ordinary case of slander (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong." And again he says: "In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in Styles, 392, and was adjudged upon error in *Mercer* v. *Sparks*. (2)" Those decisions seem to me to be direct authorities upon the present case.

I need only refer to one more case, that of *Heymann* v. *Reg.* (3), where it is laid down that at common law there is no distinction between the pleadings in civil cases and criminal cases; the general principle therefore is, that civil and criminal pleadings are the same where the criminal proceedings are not taken under a statute defining the offence in particular language. I have

(1) 4 B. & C. 247. (2) Noy, 35.
(3) Law Rep. 8 Q. B. 102.

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come, therefore, to the conclusion that this indictment is perfectly good; it would be monstrous if it were held bad. For myself I should be ready, if it were necessary, to say that an averment that a defendant "unlawfully wrote and published" a defamatory libel may, when it is being considered after verdict, be treated as an imperfect averment. I do not decide, however, upon that ground, but upon the ground that the indictment is good, that it is not in respect of an offence under or created by the section, and that the true view of the section is that it enjoins the character of the punishment to be awarded to an existing offence.

POLLOCK B. I concur in thinking that the conviction should stand upon the ground that the indictment was sufficient in law. It has been pointed out by my Lord that this is not an indictment which is framed under any particular section of the statute, or which charges a crime created by statute, and we must also bear in mind that the rules of pleading as to necessary averments, and the general rules of law as to libel, are the same in criminal and in civil proceedings. It is generally stated as a legal proposition that for anything that is a libel an action will lie, and that when such an action lies without special damage an indictment may charge the document as being a libel, and the person who publishes the libel is within the common law although he had no malicious intention in the publication. This principle has been followed out in all the cases referred to; but I may mention one case which affords a peculiar illustration of it, that of *Haire* v. *Wilson* (1), in which the jury were directed to find for the plaintiff if they thought that the defendant intended to injure him by publishing the libel. In his judgment Lord Tenterden C.J., said: "The judge ought not to have left it as a question to the jury whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict." That was the prin-

(1) 9 B. & C. 643.

ciple adopted in *Bromage* v. *Prosser* (1) and other cases; and the authorities come really to this, that it cannot be said that it is necessary in law that such an indictment as the present should aver malice. And it is clear that when the facts are sufficiently alleged in an indictment in such a manner as that, if proved at the trial, the judge would direct the jury that the offence was committed unless the presumption of malice was displaced, it is not necessary to aver malice in the indictment, for it is not necessary to prove it by direct evidence.

WILLS J. I am of the same opinion. It is clear to me that this is a good indictment at common law. The use of the word "unlawfully" excludes all such cases as publication on a privileged occasion, and the words "libel" and "publish" exclude what is called an accidental publication, for, as I understand the judgment of Lord Esher M.R. in *Emmens* v. *Pottle* (2), an accidental publication is no publication at all. And in the case of *Rex* v. *Abingdon* (3) Lord Kenyon treats an accidental publication as not being a case of libel; but if I had to decide between the two views I should prefer that of Lord Esher as being the more technically correct: either view, however, excludes all notion of an accidental publication. It seems, therefore, that every case is excluded in which the law would not attach the epithet "malicious" to the publication; and if that is so, the averment of malice cannot be the less effectively made because it is made inferentially, if the inference is inevitable.

CHARLES J. I agree that the indictment is good, and have nothing to add to the reasons already given. I may say, however, that I agree with my Lord that if the absence of the word "maliciously" is a defect the defect has been cured by verdict.

LAWRANCE J. I entirely agree.

Conviction affirmed.

Solicitors for prosecution: *Wood & Bourne, Southam.*
Solicitor for defendant: *W. B. Sanderson, Warwick.*

(1) 4 B. & C. 247. (2) 16 Q. B. D. 354.
(3) 1 Esp. 226.

W. J. B.

1895
March 28.

WEST HAM UNION *v.* CARDIFF UNION.

Poor Law—Settlement—Constructive Residence—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

A seaman left his wife for the purpose of sailing on a voyage, and with the intention of returning to her on the completion of the voyage. During his absence she removed from the parish in which they were residing at the time of his going to sea to lodgings in another parish, where he joined her on his return:—

Held, that, in the absence of evidence that the lodgings were taken by the husband's directions, the husband could not be treated as constructively resident there while he was at sea, and that the period that elapsed between his wife's removal there and his return could not be computed as part of a three years' residence by him in the parish so as to confer upon him a settlement in the parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

On March 7, 1888, Richard Taylor took lodgings for himself and his wife at Aston Street, in the Stepney Union.

On March 14, 1888, he signed articles of agreement to serve on board the ship *Ione* in the capacity of cook on a voyage to Australia and back. He duly sailed and served on board the said ship from March 17, 1888, until October 1, 1889.

On August 10, 1889, his wife removed to lodgings at Braemar Road, in the parish and union of West Ham. She was joined by him at this address on his return from sea on October 1, 1889, and she continued to reside there until September 3, 1892.

Taylor resided with his wife at Braemar Road from October 1, 1889, till February 10, 1890, when he sailed on a similar voyage as cook on the ship *Norma*. On his return from that voyage, on March 27, 1891, he again resided with his wife at Braemar Road until April 22, 1891.

On the last-mentioned date he sailed on a voyage on the ship *Antilles*. On his return, on June 22, 1891, he again resided with his wife at Braemar Road until August 5, 1891.

On that date he sailed on a voyage on the ship *Oronsay*, and on his return, on July 6, 1892, he again resided with his wife at Braemar Road till September 3, 1892, when they removed to Poplar.

During the period of the wife's residence at Braemar Road, from August 10, 1889, to September 3, 1892, she received half her husband's pay, and neither she nor her husband were at any time during that period in the receipt of parochial relief.

Richard Taylor having subsequently become chargeable as a pauper lunatic within the respondent union, the respondents obtained an order that the place of his last legal settlement was the parish of West Ham in the appellant union, on the ground that he had acquired such settlement under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, by reason of his having resided for the term of three years in that parish in the manner prescribed by the section.

The question for the opinion of the Court was whether he had so resided there for the term of three years within the meaning of the section.

Jelf, Q.C., and *Morten*, for the appellants. In order to acquire the settlement contended for by the respondents the pauper must have resided for three whole years in the parish without any break of residence. Even assuming that during his absences at sea on his second, third, and fourth voyages he was constructively resident at Braemar Road, still he did not reside there for the full period of three years, for his actual residence there did not begin till October 1, 1889, and he cannot be regarded as having been constructively resident there prior to that date, for, in the absence of any evidence of authority to the wife to remove there, his intention was presumably to return to his wife at the house where he left her, which was in the Stepney Union.

Pritchard, for the respondents. The pauper was constructively resident with his wife during the whole of his absences at sea, including the period of his absence on the first voyage. When he left her in March, 1888, he did so with the intention of returning to her, not necessarily at Aston Street, Stepney, but wherever she might be. Ubi uxor ibi domus.

Morten, in reply.

CAVE J. I am of opinion that our judgment must be for the appellants. The cases on the subject of constructive residence

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have no doubt gone a considerable length, but they have not yet gone the length of deciding that under all circumstances the residence of the wife is to be treated as the residence of the husband. If it were so, a man might be saddled with a settlement in a parish which he had never seen. There is nothing in the facts stated from which we can draw the conclusion that the wife removed to Braemar Road by the husband's directions and took the new lodgings as his agent. And in the absence of such evidence the order of the justices cannot be supported.

WRIGHT J. concurred.

Appeal allowed.

Solicitor for the appellants: *F. E. Hilleary.*
Solicitor for the respondents: *C. Evans.*

J. F. C.

1895

March 27.

PHYTHIAN *v.* BAXENDALE.

Highway—Driver leaving Cart unattended whilst "passing upon" Highway—Cart left Standing—Highways Act, 1835 (5 *&* 6 *Wm.* 4, *c.* 50), *s.* 78.

Sect. 78 of the Highways Act, 1835, which makes it an offence for the driver of any carriage to be at such distance from it "whilst it shall be passing upon such highway that he cannot have the direction and government of the horses or cattle drawing the same," applies where the driver leaves the carriage standing by the roadside.

CASE stated by justices under the Summary Jurisdiction Acts.

At a petty sessions holden at Much Woolton, in and for the division of Childwall, in the county of Lancaster, on December 7, 1894, an information was preferred by Richard Baxendale, the respondent, who was a superintendent of police, against the appellant William Phythian, under s. 78 of the Highways Act, 1835 (5 & 6 Wm. 4, c. 50), charging that he, on November 3, 1894, at Allerton, in the county of Lancaster, "then being the driver of a certain carriage, to wit a cart, on a certain highway there situate, was then and there negligently and wilfully at such a distance from such carriage, whilst the same was then passing upon the said highway, that he would not have and had not the direction and government of the horses then and there drawing the same."

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It was proved that on the day in question the appellant was the driver of a laden lorry or farm waggon drawn by two horses on a journey from Halewood to Liverpool, and that he stopped his horses at the place in question and left them standing on the highway while he went into a public-house, a distance of ten yards or thereabouts from the waggon; that he was away ten minutes, and that during that time he had not the direction and government of the horses; that at the end of that time he returned to his horses, started them, and went on his way. It was admitted that the waggon and horses did not obstruct the passage of the highway, and that they were standing still during all the time that the appellant was away from them. The justices convicted the appellant, and stated this case for the opinion of the Court. (1)

Temple Franks, for the appellant. The particular clause of the section under which the appellant was convicted has no application where the horse and cart is left standing by the roadside. It is expressly limited to the case where the cart or carriage is "passing upon such highway." Those words necessarily imply motion along the highway. The words "the horses drawing the same" are also inapplicable to a case where the horses and cart are standing still. The legislature in other parts of the same section deals with vehicles left standing upon the highway. It is, for instance, an offence for a driver to cause hurt or damage to any persons conveyed in any carriage "passing or *being* upon such highway," or to "leave any cart or carriage upon such highway so as to obstruct the passage thereof." The section also makes it an offence for any driver

(1) By the Highways Act, 1835 (5 & 6 Wm. 4, c. 50), s. 78, "If the driver of any carriage whatsoever on any part of any highway shall by negligence or wilful misbehaviour cause any hurt or damage to any person . . . . conveyed in any carriage passing or being upon such highway, or shall quit the same and go on the other side of the hedge or fence enclosing the same, or negligently or wilfully be at such distance from such carriage or in such a situation whilst it shall be passing upon such highway that he cannot have the direction and government of the horses or cattle drawing the same . . . . every person . . . . being convicted of any such offence . . . . shall . . . . for every such offence forfeit any sum not exceeding five pounds . . . ."

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"to prevent any other person from passing him." The word "passing" is clearly, therefore, used in the section as implying motion, and in contradistinction to the word "being." If the view taken by the justices is correct, the words "whilst it shall be passing upon such highway" have no meaning.

Mattinson, for the respondent, was not called upon to argue.

CAVE J. The case is a very clear one, and this appeal must be dismissed. The justices could, I think, have come to no other conclusion. The words in the section "whilst it shall be passing upon such highway" mean, whilst it is on its way or journey, and apply equally whether the driver leaves his horses while they are moving, or first stops them and then leaves them. The horses were passing upon the highway on their journey from Halewood to Liverpool; and they were liable, owing to the absence of the driver's control, to be the cause of accident which it was the object of the statute to prevent.

WRIGHT J. I agree.

Appeal dismissed.

Solicitors for appellant: *J. O. Swift & Co.*

Solicitors for respondent: *Ridsdale & Son.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1894
Nov. 12, 14, 15, 16, 17; *Dec.* 14.

THE QUEEN *v.* THE VESTRY OF ST. MARYLEBONE.

Ecclesiastical Law—Church Rate—Rate authorized by Local Act—"Contract for Good or Valuable Consideration"—Compulsory Church Rate Abolition Act, 1868 (31 & 32 *Vict. c.* 109), *s.* 5—*Burial Board—Burial Fees—Fees by Law or Custom payable to Churchwardens or Trustees for Parochial Purposes—Burial Act*, 1852 (15 & 16 *Vict. c.* 85), *s.* 36.

By s. 5 of the Compulsory Church Rate Abolition Act, 1868, it is provided that "this Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied . . . upon any contract made, or for good or valuable consideration given":—

Held, that the "contract made" or the "consideration given" must be found in or be gathered from the Act which authorizes the levying of the church rate.

Under the provisions of a local Act certain fees payable in respect of burials in the burial ground of a metropolitan parish were applicable to the purpose, amongst others, of the repair of the parish church.

By the Burial Act, 1852, the existing metropolitan parochial burial grounds were closed, and new burial grounds, under the management of burial boards, were provided. Sect. 34 of that Act empowered the burial board to fix and receive the fees in respect of interments in the new burial ground provided for the parish. By s. 36, "Where fees or any portions of fees payable on interments . . . in the burial ground of any parish for which a burial ground is provided . . . under this Act are by law or custom payable to the churchwardens . . . or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose . . . such fees or portion of fees shall be payable in the burial ground to be provided as aforesaid for such parish under this Act, and shall be received by the burial board and paid to the parties entitled to receive the same":—

Held, that the repair of the parish church was a parochial purpose within the meaning of s. 36, and that the fees received by the burial board under s. 34 of the Act were applicable to the purpose of this repair.

CAUSE shewn against a rule nisi for a mandamus.

On the application of the prosecutor, the rector of the parish of St. Marylebone, a rule nisi was granted for a mandamus to the vestry of the parish, commanding them to levy a rate, under the provisions of the statutes 51 Geo. 3, c. cli., and 1 & 2 Geo. 4, c. xxi., for the purpose of repairing the parish church, the parish chapel, and St. John's Wood Chapel, in the same parish, or in the alternative, commanding the vestry to take the necessary and legal measures and proceedings for obtaining and recovering

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payment to them by or from the burial board of the parish, pursuant to s. 36 of the Burial Act, 1852 (15 & 16 Vict. c. 85), of the fees or portions of fees payable on interments, &c., in the consecrated portion of the cemetery of the parish at Finchley, payable to the vestry under the statutes 51 Geo. 3, c. cli., and 1 & 2 Geo. 4, c. xxi., and in pursuance of those statutes to apply the same in taking all necessary steps to place the parish church, the parish chapel, and St. John's Wood Chapel in good and sufficient repair.

In the year 1810 the Duke of Portland was lord of the manor of Marylebone, and was also lay rector of the parish, and patron of the living. He claimed, moreover, to be incumbent of the parish, and to have the right of appointing the minister and of removing him at pleasure. In the year 1792 the Duke had instituted proceedings in the Consistory Court of London against the Rev. Dr. Bingham, a clergyman who then performed the office of joint Sunday preacher in a chapel in the parish, claiming, as lay rector, impropriator, and parson of the rectory and parish of St. Marylebone, to prevent Dr. Bingham from officiating in the chapel, on the ground that his licence from the bishop had been obtained in violation of the rights of the Duke, and the Duke sought to have that licence revoked. Sir W. Scott, the judge of that Court, dismissed the suit, on the ground that the Duke did not shew that he was incumbent of the parish: vide *Duke of Portland* v. *Bingham*. (1) In a note to that report it is stated that, after the dismissal of this suit, the Duke took out another citation against Dr. Bingham for the same purpose, claiming also as patron and incumbent of the parish; that some steps were taken in this suit, but that "the cause was then discontinued, and nothing more appears to have been done upon it."

In 1810 the vestry were in communication with the Duke with reference to the purchase from him of a site for an intended new parish church. After some correspondence on the subject, the Duke on June 11, 1810, wrote a letter to the then vicar of the parish, offering the ground south of the New Road, marked A in the plan, as a free gift to the parish.

(1) 1 Hagg. Cons. 157.

Steps were then taken to obtain an Act of Parliament to enable the vestry to build a new parish church and two chapels, and ultimately the Act 51 Geo. 3, c. cli., was passed.

This Act was entitled "An Act to enable the vestrymen of the Parish of St. Mary-le-bone, in the county of Middlesex, to build a new parish church and two or more chapels, and for other purposes relating thereto." It recited that the vestry had purchased and inclosed a piece of ground for an additional cemetery.

By ss. 14, 26, and 31 the vestrymen were empowered to acquire land for building, and to build a new parish church and two chapels, and a chapel in the burial-ground inclosed by them.

Sect. 35 and other sections conferred the right of appointing ministers of the new church and other patronage on the then Duke of Portland, or the person or persons for the time being entitled to the rectory of the parish, and to the advowson of the church of the parish, and having the right of nominating and appointing a minister or ministers to the old church.

Sect. 49 empowered the vestrymen "to settle and fix the rates and fees for burial of the dead in the said intended cemetery or burial ground, and in the vaults under the same," and "from time to time to make such rules, orders, and regulations relative to burials, and for keeping the new church, chapels, and vaults, and the vaults of the cemetery or burial ground" in good and sufficient repair.

Sect. 61 provided that, "for raising money to defray the charges and expenses of carrying the Act into execution," the vestrymen should be empowered to make rates upon the parishioners not exceeding fourpence in the pound for any one year.

Sect. 71 empowered the vestrymen for the purposes of the Act to borrow money upon the security of the rates and burial fees.

By s. 80: "If at any time . . . . the moneys arising from the rents of the pews in the said intended church and chapels, and the rates and fees received on account of burials within the several cemeteries, burial grounds, and vaults within the said parish, and from the rates or assessments to be raised by virtue of this Act, shall be more than sufficient for paying and discharging the several . . . . sums and salaries to be paid by this

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Act, and the repairs of the said intended new church and chapels, ... it shall be lawful for the said vestrymen to apply such overplus moneys to such parochial purposes as the said vestrymen shall think right and proper, and as shall in their judgment be for the use and benefit of the parishioners of the said parish."

In August, 1812, the Duke of Portland conveyed to the vestry the land which he had offered as a site for the new church.

In pursuance of the Act, the vestry built a new parish church on the site granted by the Duke, and the new cemetery was consecrated and used as the parish burial ground.

Under the provisions of the Act, the vestry levied a rate of fourpence in the pound, and they also received (after deducting the surplice fees payable to the minister of the parish) all fees for burials in the parish, including burials in the vaults of the parish church and both the chapels, and fees for the erection of vaults and monuments, and also the pew rents paid in respect of pews or sittings in the parish church and the chapels, and they applied the mixed fund thus created, which they called "The Church Rate Fund," in paying off, and paying interest upon, the moneys which they had borrowed under the Act; in payment of the salaries of the ministers, clerks, sextons and pew openers, as authorized by the Act; in repairs and maintenance of the church and the chapels, and of the services therein; and other expenses of putting the Act into execution.

Under an Act 57 Geo. 3, c. 98, the rectory, advowson, and right of nomination of the minister of the parish church were purchased by and vested in the Crown.

The Act 1 & 2 Geo. 4, c. xxi., recited that the vestrymen had, in execution of the Act of 51 Geo. 3, built a new parish church ". . . . and that the said vestrymen had agreed with the Church Building Commissioners to procure four sites for four district churches. . . ." and to pay 20,000*l.* towards building those churches, on condition that the Commissioners should build them.

The Act authorized (s. 3) the Commissioners to build four district churches on four specified sites; and (s. 4) authorized and required the vestrymen to pay to the Commissioners 5000*l.*

in respect of each such district church. Sect. 7 authorized the vestrymen, with the consent of the Bishop of London for the time being, to fix pew rents in the district churches. Sect. 10 provided that separate and distinct accounts should be kept of the pew rents derived from each district church; and, after payment of the stipend to the district minister and other salaries, and of the repairs and expenses of each respective district church, the surplus of pew rents received from such respective district church was to be accumulated for the purpose of forming a fund for the building of a residence for the minister, and, after the completion of that purpose, the surplus should be applied to one of certain specified purposes, as should be directed by the bishop of the diocese for the time being, and for want of such direction the surplus should, with the consent of the bishop, be paid and applied in aid of the rate to be raised under and by virtue of the Act of 51 Geo. 3, or for such other parochial purposes as the vestrymen might think fit. By s. 18 the vestry were empowered to make an additional rate of twopence in the pound for carrying out the purposes of the Act and the recited Act into effect. Sect. 23 provided that it should be lawful for the vestrymen, and they were thereby required, from time to time to maintain and repair the four district churches. Under the provisions of this Act the vestry procured the sites for the four district churches, and the Commissioners built them.

From the passing of this Act down to the passing of the Compulsory Church Rates Abolition Act, 1868 (31 & 32 Vict. c. 109), the vestry levied one rate for the purposes of the two Acts (51 Geo. 3, c. cli., and 1 & 2 Geo. 4, c. xxi.).

The vestry continued to receive the burial, monument, and vault fees receivable under the Act 51 Geo. 3, c. cli., in respect of the parish church, the parish chapel, and St. John's Wood Chapel, and church and cemetery, and these fees, together with the rates, continued to constitute a mixed fund. This fund was applied in paying off the moneys borrowed under the earlier Act and the interest thereon, and the other expenses of carrying that Act into execution (including the expenses of repairing the parish church, the parish chapel, and St. John's Wood Chapel), and also in paying off the money borrowed under the

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later Act and the interest thereon, and in making good the deficiencies arising in the accounts of the district churches.

In 1852 the Burial Act, 1852 (15 & 16 Vict. c. 85), was passed. It provided for the discontinuance by Order in Council of burials in the metropolis; the formation of burial boards, and the creation of cemeteries outside the metropolis for the parishes the burial grounds of which should respectively be closed. This Act contained (inter alia) the following sections:—

By s. 19: "The expenses incurred or to be incurred by the burial board of any parish in carrying this Act into execution shall be chargeable upon and paid out of the rates for the relief of the poor of such parish."

By s. 20: "Provided always, that it shall be lawful for the board, with the sanction of the vestry and the approval of the Commissioners of Her Majesty's Treasury, to borrow any money required for providing and laying out any burial ground under this Act, and building a chapel or chapels thereon, or any of such purposes, and to charge the future poor rates of the parish with the payment of such money and interest thereon."

Sect. 22: "The money raised for defraying such expenses, and the income arising from the burial ground provided for the parish, except fees payable to the incumbent, clerk, and sexton of the parish, and the other fees herein directed to be otherwise paid, shall be applied by the board in or towards defraying the expenses of such board under this Act, and whenever, after repayment of all monies borrowed for the purposes of this Act in or for any parish, and the interest thereof, and after satisfying all the liabilities of the board with reference to the execution of this Act in or for the parish, and providing such a balance as shall be deemed by the board sufficient to meet their probable liabilities during the then next year, there shall be at the time of holding the meeting of the vestry at which the yearly report of the auditors shall be produced any surplus money at the disposal of the board, they shall pay the same to the overseers, in aid of the rate for the relief of the poor of the parish."

Sect. 24 incorporated the board by the name of "The Burial Board for the Parish of ( ) in the County of ( );"

and empowered them to take, purchase, and hold land for the purposes of the Act.

Sect. 32: "From and after the consecration as aforesaid of any burial ground provided under this Act (except any portion thereof intended not to be so consecrated) . . . . such burial ground shall be deemed the burial ground of the parish for which the same is provided . . . . and every incumbent or minister of the parish . . . . for which such burial ground is provided . . . . shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received . . . . as if such burial ground were the burial ground of the respective parish of such incumbent or minister. . . ."

Sect. 34: "Every burial board under this Act shall and may (without prejudice to the fees and payments herein specially provided for) fix and settle and receive such fees and payments in respect of interments in any burial ground provided by such board as they shall think fit, and also the sums to be paid for the exclusive right of burial, either in perpetuity or for a limited period, in any burial ground provided by such board."

Sect. 36: "Where fees or any portion of fees payable on interments . . . in the burial ground of any parish for which a burial ground is provided alone or jointly with any other parish or parishes under this Act are by law or custom payable to the churchwardens of any parish, or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any debt or liability, such fees or portion of fees shall be payable in the burial ground to be provided as aforesaid for such parish under this Act, and shall be received by the burial board and paid to the parties entitled to receive the same; and where fees or payments have been received on interments, or for any monument, gravestone, tablet, or monumental inscription, in the burial ground of any such parish by any such churchwardens, or by trustees or other persons, for the purpose of discharging any periodical payment or other liability, it shall be lawful for the burial board, upon the request of such churchwardens, trustees, or persons, to pay from time to time,

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out of the fees and moneys received by them on account of such parish, such amount as may be necessary for discharging such periodical payment or liability."

After the passing of the Burial Act, 1852, a burial board for the parish of St. Marylebone was constituted, and a cemetery for the parish was provided at Finchley. This cemetery was opened in March 1855. By various Orders in Council, made in 1853, 1855, and 1857, all the old burial grounds in the parish were closed, except for a limited class of interments. After this the vestry received only a very small amount of fees for interments, &c., in the old burial grounds. The fees for interments, &c., in the new cemetery were received by the burial board, and no part of these fees was paid over by them to the vestry. The surplice or service fees payable to the rector were received by the board, and were paid over by them to him. A table of fees for interments, vaults, monuments, &c., in the new cemetery was fixed by the burial board in March 1855, and was approved and sanctioned by the vestry. It was also, on April 7, 1855, approved by the then Bishop of London. This table stated the gross fees to be charged (including the rector's fees), and it stated separately the amount of the rector's fees payable out of the gross fees.

By s. 7 of the Burial Act, 1855 (18 & 19 Vict. c. 128), which was passed on August 14, 1855, it was provided that all such fees, &c., as might be fixed, settled, and received by any burial board under s. 34 of the Burial Act, 1852, should be so fixed and settled subject to the approval of a Secretary of State, and that no such fees, &c., should be altered or varied without such approval.

In 1868 was passed the Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), which provided by s. 1 that from and after the passing of the Act the payment of any church rate should not be enforced by any legal process.

By s. 2: "Where in pursuance of any general or local Act any rate may be made and levied which is applicable partly to ecclesiastical purposes and partly to other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only, and so far as it is applicable to such purposes

shall be deemed to be a separate rate, and not a church rate, and shall not be affected by this Act.

"Where in pursuance of any Act of Parliament a mixed fund, arising partly from rates affected by this Act and partly from other sources, is directed to be applied to purposes some of which are ecclesiastical purposes, the portion of such fund which is derived from such other sources shall be henceforth primarily applicable to such of the said purposes as are ecclesiastical."

By s. 5: "This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment, or of the appropriation to any other purpose, of any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed."

By s. 10, in this Act "ecclesiastical purpose" shall mean (inter alia) the "repair of any church or chapel."

From the passing of this Act down to the end of the financial year ending March 25, 1890, the Marylebone Vestry continued to levy a rate of 1*d.* in the pound, and to receive the pew rents, and such burial fees (if any) as were payable in respect of the old vaults and burial grounds, and to apply the mixed fund thus created as they did before the passing of the Act, and in particular in paying the expenses of repairing the parish church.

In 1890, the vestry adopted and had since followed a new method with regard to the rate which they continued to levy, dividing it into two parts, which were described as "(1.) Rate under Local Church Acts (51 Geo. 3, c. cli., and 1 & 2 Geo. 4, c. xxi.)," and "(2.) Separate rate (Compulsory Church Rate Abolition Act, 1868) for purposes named in the 51 Geo. 3, c. cli., other than ecclesiastical." This change was made apparently because the vestry had been advised that they had no longer any power to levy a rate under the Act of 51 Geo. 3 for any

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ecclesiastical purpose (such as the repair of the church); but that they still had power to levy a rate under the Act of 1 & 2 Geo. 4 for any of the purposes of that Act (including the repair of the four district churches).

After this alteration was made the vestry refused to levy a rate for the purpose of repairing the parish church, or to apply any part of the rate which they did levy to that purpose. The pew rents and such burial fees as the vestry received were insufficient for the purpose, and ultimately the application for a mandamus was made.

In 1893 the table of charges made by the burial board was revised and altered, and the altered charges were approved by a Secretary of State.

The Divisional Court (Mathew and Day JJ.) discharged so much of the rule as called upon the vestry to make a church rate, but made absolute that portion of the rule which required them to take steps to recover from the burial board the fees paid to them under the Burial Act, 1852, and to apply them to the repair of the parish church and chapels.

The prosecutor appealed against the refusal of the mandamus to make a church rate, and there was a cross-appeal by the vestry against the allowance of the mandamus as to the burial fees.

Sir H. James, Q.C., Dr. Tristram, Q.C., H. Sutton, and *A. H. Dennis,* for the prosecutor. A mandamus to levy a church rate ought to have been granted. Sect. 5 of the Compulsory Church Rate Abolition Act, 1868, applies. The rate was levied under the two local Acts of Geo. 3 and Geo. 4 "upon a contract made, or good or valuable consideration given." It is not necessary that there should be a formal contract. There was in substance and effect a contract between the vestry and the Duke of Portland that they would apply for the first Act, and would build the new church and chapels and keep them in repair, and that he would give a site for the new church, and would relinquish some of the rights which he claimed as incumbent of the parish. It is not necessary that the contract should be expressly stated in the local Act; it may be implied. There is sufficient evidence here of a contract and of valuable con-

sideration given; *Bell* v. *Barrett* (1); *Watson* v. *Vestry of All Saints', Poplar.* (2)

The local Act of Geo. 4 expressly states a contract and valuable consideration for the authority given to levy the additional rate of twopence in the pound, namely, the agreement with the Church Building Commissioners, which is recited in the Act, and the erection of the four churches by them. And, as it is provided that there is to be only one rate not exceeding sixpence in the pound, the contract and the consideration given apply to the whole rate, and s. 5 of the Act of 1868 is satisfied. In fact, the power to levy the whole rate is now derived from the Act of Geo. 4, which, if it has not repealed the Act of Geo. 3, is substituted for it. The rate should now be levied for the purposes of both the Acts.

Sir R. Webster, Q.C., English Harrison, and *Dibdin,* for the vestry. The expression in s. 5 of the Act of 1868, "upon any contract made," is equivalent to "pursuant to" or "by virtue of" any contract made. The contract must be expressed in the Act, or gathered within its corners, not derived aliunde.

A person who wishes to ascertain whether a rate is by means of a contract still leviable should be able to ascertain the contract from the local Act itself; he has no means of discovering an outside contract. Sect. 5 is such a general one that some limitation must be placed on it. The gift of the site by the Duke was a "free gift"; there was no agreement at all between him and the vestry.

It must appear in the local Act that the rate is levied for good or valuable consideration. The consideration must be connected with the authority given to levy the rate. There must be consideration moving to the person by whom the gift of the site was made. That gift cannot be treated as consideration for the power to levy the rate. There was no consideration in the supposed relinquishment by the Duke of rights which he had or claimed as incumbent of the parish. It is clear from *Duke of Portland* v. *Bingham* (3) that the Duke's claim to be incumbent had no foundation, and, moreover, the preamble of the Act 57 Geo. 3, c. 98, describes the Rev. Luke Heslop as "at

(1) 52 L. J. (Q.B.) 22. (2) 46 L. T. (N.S.) 201.
(3) 1 Hagg. Cons. 157.

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present the incumbent" of the parish. The twopence rate authorized by the Act of Geo. 4 is linked with the fourpence rate only for the purpose of collection. The purposes of the two Acts are distinct. The object of s. 5 was explained in *Watson* v. *Vestry of All Saints', Poplar.* (1)

As to the burial fees, the mandamus ought not to have been granted. Sect. 36 of the Burial Act, 1852, has no application to the burial fees which the vestry formerly received in respect of the old burial grounds and vaults. The prosecutor is really claiming the fees payable under s. 34, which are the only fees charged by the burial board, and which are quite distinct from those which are dealt with by s. 36. The revising authorities as regards those two classes of fees are different—in the one case, the Secretary of State; in the other, the bishop. The fees under s. 34 are applicable to the expenses of the burial board; if those fees are paid over to the vestry there will either be no means of providing for the expenses of the board, or double fees must be charged. There never have been in this parish any such fees as are contemplated by s. 36, payable by law or custom in the old burial grounds to churchwardens or trustees or others for parochial purposes.

The mandamus ought, as regards the burial fees, to have been directed to the burial board, not to the vestry.

Sir H. James, Q.C., in reply, on the appeal. There is no ground for saying that the contract or valuable consideration must appear in the local Act. There is no reason why they should appear any more than the other matters referred to in s. 5 of the Act of 1868, e.g., "the extinguishment of tithes," which clearly might be proved aliunde.

Sir H. James, Q.C., and *Dr. Tristram*, in answer to the cross-appeal. As to the burial fees, the objection to the form of the mandamus was not insisted upon in the Divisional Court. At any rate, the Court can give leave to amend.

The old fees must be charged still, unless the bishop sanctions their discontinuance. The fees under s. 34 can be varied with the sanction of a Secretary of State. It is the duty of the burial board to compel payment of the old fees and to hand them over

(1) 46 L. T. (N.S.) 201.

to the vestry. Under the Act of Geo. 3 the vestry were entitled to receive those fees for parochial purposes; and the repair of the parish church is a parochial purpose. By s. 36 all fees are preserved of which the parish had the benefit. It is said that it would be monstrous that Nonconformists should have to pay indirectly for the repair of the church by means of burial fees when the compulsory church rate has been abolished; but the old burial fees were applied in that way.

Reg. v. *Commissioners of Port of Southampton* (1) is an authority for granting the mandamus.

English Harrison, in reply upon the cross-appeal. No fee under s. 36 has in fact ever been charged by the burial board. The mandamus is, therefore, wrong in form. The vestry cannot hand over fees which they have never received, even if the board ought to have charged those fees. Sect. 36 has no application to this parish.

Cur. adv. vult.

Dec. 14. LOPES L.J. The object of the rule for a mandamus was this—to call upon the vestry of St. Marylebone to exercise statutory powers conferred upon them to make a rate for the repairs of the parish church, and alternatively to compel the vestry to take proper steps to recover from the burial board of the parish certain fees said to be applicable for that purpose.

Now, two questions arose upon that rule. The first was this. Is there a power to levy a church rate for the repairs of the parish church? And, secondly, were there any fees derivable from the burial board applicable to that purpose?

I will deal first with the question whether there was power to levy a rate for the repairs of the church. The history of the case is very short. At the time when the local Act was passed the old parish church was found to be insufficient. The leading members of the vestry, including the Duke of Portland, determined to apply to Parliament for power to erect a new church; and they did apply, and an Act of Parliament was obtained. That is the local Act of 51 Geo. 3, c. cli., and it was obtained in the year 1811. The title of the Act is "An Act to enable the

(1) Law Rep. 4 H. L. 449.

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vestrymen of the parish of St. Marylebone to build a new parish church, and two or more chapels, and for other purposes relating thereto." All parties interested co-operated for the purpose of obtaining that Act. I can find nothing like a contract. Nobody was bound to build a church. In the words of Mathew J. there was co-operation, mutual assent, and mutual effort, but no more. A subsequent Act was obtained in the same way in the year 1821 (1 & 2 Geo. 4, c. xxi.), and that Act enabled the vestrymen to procure sites for additional churches, and they were authorized to levy a further rate to repay money borrowed; but again I can find nothing in the Act indicating any contract between the parties before they applied to Parliament. Both these Acts contained powers enabling the vestry to make rates in the nature of church rates. In 1868 the Act for the abolition of compulsory church rates was passed, and that Act made church rates irrecoverable except in (among others) certain cases provided for in s. 5 of that Act. Sect. 5 says that the Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be levied (amongst other things) "upon any contract made or for good or valuable consideration given." In my opinion, the contract made or the consideration given must be found in or be gathered from the Act authorizing the levying of church rates; but I can find in this case neither the one nor the other anywhere, neither in any Act of Parliament nor outside. The case, therefore, is not brought within s. 5 of the Church Rates Abolition Act, and, upon the first ground, with regard to levying a church rate, the application for a mandamus fails.

The second ground taken was this—that there are burial fees available for the repair of the church, and that they ought to be handed over to the vestry. Under the Act 51 Geo. 3, c. cli., fees arising from the burial of the dead were to be collected and paid to the treasurer of the vestrymen, to be applied for the purposes of the Act, and the surplus from time to time was to be applied to such parochial purposes as the vestrymen should think fit. Those purposes would include the repairs of the church. Then comes s. 36 of the Burial Act, 1852 (15 & 16 Vict. c. 85). [The Lord Justice read

s. 36.] The result, in my judgment is this, that the burial fees, except service fees to the incumbent, clerk, and sexton, are receivable by the burial board, and are payable to the vestry for parochial purposes. It appears to me that that is the effect of the portion of the local Act to which I have referred, and of the general Act. There are many sections which confirm that view. I have not thought it necessary to deal with all those sections, because in the judgment of my brother Rigby, which I have had the opportunity of reading, he has fully and completely done so. The object of the Act of 1852 is, in my opinion, to carry forward to a new cemetery, to be created by the Act and used in lieu of the old burial place, all the rights which existed in respect of the old church burial ground. It was therefore the duty of the burial board to hand over the fees (except service fees to the incumbent, clerk, and sexton) received by them to the vestry, to be applied as provided by the private Act. It was said that the burial fees are insufficient to pay the expenses of the board. Sect. 19 of the Act of 1852 provides that the expenses of the burial board are to be paid out of the poor-rate. It is, therefore, no answer to say that the fees are insufficient to cover the expenses of the burial board. They may be charged on the poor-rate. I should have thought that the mandamus should have been addressed to the burial board, directing them to hand over these fees to the vestry, the burial board being an independent corporate body; but this is a mere technical objection.

I agree with the judgment of the Court below on both points. The form of the mandamus, I think, should be this. A mandamus directing the vestry to apply the fees payable to them by the burial board towards the repairs of the church.

RIGBY L.J. The first point in this case depends upon the construction of s. 5 of the Compulsory Church Rate Abolition Act of 1868. The enactment, the operation of which is saved by this section, must, so far as this case is concerned, be an enactment under the authority of which church rates may be levied "upon any contract made or for good or valuable consideration given." I do not think that a rate can properly be

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said to be levied upon a contract or for a consideration by the authority of an enactment if the authority is only to levy the rate without more, and no notice is taken of the contract or consideration. If s. 5 applied wherever a contract or consideration could be found outside the Act it would be impossible to decide as to the power of enforcing a rate without an exhaustive inquiry into all the circumstances attending the obtaining of the Act, which in many cases would be impossible. It has been suggested that contracts or considerations may have been brought to the notice of a committee of one House of Parliament or the other, but that would not be, to my mind, sufficient. No committee can legislate, and the only test which can be applied in order to solve the question whether a contract or consideration has influenced the Legislature, is to look at the Act itself. In my judgment, the contract or consideration must be one appearing upon, or to be arrived at by the construction of, the enactment, and I do not find any contract or consideration for the levying of these rates in either of the Acts relied upon.

The contract or consideration put forward in the present case is either the grant of the site for the church, or the relinquishment of rights of patronage, by the lay rector, the Duke of Portland. No reference to the gift of the site, nor any contract relating thereto, is to be found in the Act of Geo. 3; and, with reference to the alleged right of patronage or interference in the case of the new chapels, I am of opinion that, the Rev. Luke Heslop being recognised by s. 35 of the Act as the "minister of the parish," the Duke of Portland could not maintain the claim to be considered incumbent set up, as appears in 1 Hagg. Cons. Reports, 157, which must have been abandoned before the date of the Act. There is a contract set forth in the Act of Geo. 4; but that seems to me to have relation only to the additional rate, not exceeding twopence in the pound, to be levied for the purposes of that Act, and I cannot accept the argument that the consolidation of the rates under the two Acts gave any powers as to the rate levied under the earlier Act which were not already given by such earlier Act, or that any part of the rate to be levied under the earlier Act could be applied for the purposes of the later Act or vice versâ. I consider the provisions as to

making one rate to be for the purposes of convenience only, and not to alter substantive rights under either Act. I may add that I agree with Lopes L.J. that, even outside the Act, there is no evidence of any contract at all. There was co-operation only, but no contract, although I do not think that really material for the decision of this case.

The second point, as to the burial fees, depends upon the construction of the Act of Geo. 3 and of the Burial Act, 1852, as varied by 18 & 19 Vict. c. 128, s. 7, which says that the approval of a Secretary of State shall be necessary for any revision of the burial fees.

Now, s. 49 of the Act of Geo. 3 enables the vestrymen to settle the rates and fees for burial of the dead in the vaults of the new church, and of all and every the chapels to be erected and built by virtue of the Act and in the intended cemetery and in the vaults under the same, and gives them power from time to time to alter and amend such rates and fees. Sect. 71 gives the vestrymen power from time to time to borrow sums of money, not exceeding £150,000 at any one time, upon the credit of (among other things) the rates and fees arising on account of burials in the new church and chapels and in the intended cemetery, and also on the rates and fees arising on account of burials in any other cemetery, burial ground, or vault within the parish, and to assign all or any part of such rates or fees to any person who may advance money thereon as security for the principal money to be advanced, with interest thereon. Sect. 78 provides that the moneys arising from such rates and fees, after paying the expenses attending the obtaining of the Act, shall be applied and disposed of for and towards carrying the several purposes of the Act into execution. Sect. 80 provides that the vestrymen shall apply any overplus money (I am stating the section shortly) to such parochial purposes as they shall think right and proper. All the special purposes of the Act are, in my judgment, "parochial purposes"; so that the effect of the Act is that all rates and fees for burials within the parish are applicable by the vestrymen to parochial purposes. Some of these purposes are "ecclesiastical purposes" within the meaning of the Act of 1868; others are not ecclesiastical purposes within the meaning

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of that Act; but they are all, in my judgment, "parochial purposes."

Turning now to the Act of 1852, the material sections, in my opinion, are as follows. (I give only the short effect of them.) Sect. 19 makes the expenses of the burial board chargeable upon and payable out of the poor-rates. That is the leading section as regards the expenses of the burial board. Sect. 22 provides that the moneys raised for defraying such expenses, and the income arising from the burial ground provided for the purposes of the parish, except fees payable to the incumbent, clerk, and sexton of the parish, and the other fees therein directed to be otherwise paid (the reference here being to s. 36), shall be applied by the board towards defraying the expenses of the board, any surplus money to be paid to the overseers in aid of the poor-rate. I pause here to observe that, if the burial fees that we are dealing with fall within s. 36, there is absolutely no right in the burial board to expend a penny of them in payment of their expenses. They must go back to s. 19, and have their expenses paid according to that section. Sect. 34 enables the burial board to fix and settle (without prejudice to fees and payments in the Act specially provided for, which words include, in my judgment, the special provision made by s. 36) the fees and payments to be made for interments in any burial ground, and other fees and payments specified, being those for monuments, graves, and so on, and enables them, with the consent of the vestry, to revise and alter such fees and payments. This section is varied by s. 7 of the Act 18 & 19 Vict. c. 128, which makes any settlement of fees under it subject to approval by a Secretary of State. Sect. 36 of the Act of 1852 is the leading and most important section, and it provides (amongst other things) that fees by law or custom payable to churchwardens, trustees, or other persons, for or towards payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any debt or liability, shall be payable in the burial ground to be provided for the parish under the Act, and shall be received by the burial board and paid to the parties entitled to receive the same. Then s. 37 provides that it shall be lawful for the vestry, with the consent of the bishop

of the diocese, to revise and vary fees payable to the incumbent, clerk, and sexton, and other persons and bodies under the provisions of the Act.

I think these are all the sections which were referred to, and at any rate they appear to me all that are material. Now, the rates and fees settled and leviable under the Act of Geo. 3 seem to me to fall within the express words of s. 36. They are payable to the vestrymen for parochial purposes, and, so long as there is any debt or liability under the Act of Geo. 3, they are payable for the discharge of such debt or liability. They must, therefore, be payable as in s. 36 provided, unless sufficient cause can be shewn to the contrary. I have considered the arguments addressed to the Court on this point, and I do not think them sufficient. It is suggested that the expenses of the burial board are first to be paid out of the fees and payments received by them, and that there is no surplus after payment of those expenses. The answer to this is, that s. 19 provides for the payment of the expenses out of the poor-rate, and that s. 22, in providing for payment of expenses, expressly excludes the fees in question as being by the Act directed to be otherwise paid.

Then it is said that fees for the purposes of the Act of Geo. 3 have not in fact been levied by the burial board, and it is attempted to make this out by shewing that the fees levied in respect of burials in the unconsecrated ground differ from those levied in respect of burials in the consecrated ground only by reason of the latter including in addition the fees received for or on account of the incumbent, clerk, and sexton. A comparison of the actual fees levied by the board seems to establish the fact, and the provision made by 20 & 21 Vict. c. 81, s. 17, is thereby complied with.

Now, we have had placed before us certain tables of fees, the first being a table of burial fees as revised by the vestry in February, 1835, and March 8, 1840. For what it is worth that document has been admitted by Mr. Dibdin, and I think rightly admitted, to be a correct document. I think nothing turns upon the particular figures that are to be found in that document. But it is not unimportant to observe that it includes not only interment fees, that is, the fees for the actual interments

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upon any occasion, but also fees for the purchase of vaults and compartments, and fees for putting up monuments and gravestones. The table shews that the vestry considered themselves entitled to fees of those different classes, and it was not argued that the charge was ultra vires, nor do I consider that it was so. The words of the Act of Geo. 3 are very wide: they are to fix rates and fees for burial in the ground, and this would seem to cover all the charges in the table. Then came the Act of 1852, and Orders in Council made under that Act, which closed for all general purposes (subject only to exceptions which are unimportant) all the vaults and burial grounds within the parish of St. Marylebone; and thereupon a burial board, in pursuance of the Act, was appointed, and the vestry appointed a committee to confer with the burial board as to the fees which were now to be charged for the several purposes. There was a scale of fees fixed, not only of fees payable to the incumbent, clerk, and sexton, but of all fees payable, and it is partly upon this that the argument was based that no fees for the vestry have ever been raised. I think it is made out that, when you subtract from the total fees the rector's fees (there appear to have been none payable to the clerk, the churchwardens, or sexton), the fees do correspond substantially (and I dare say it will turn out accurately) with the fees which were approved by the Secretary of State in the year 1893; but there was an approval by the vestry on March 31, 1855, and an approval by the bishop in April of that same year, and I think that that was rightly done. It was suggested that the approval of the bishop referred only to the rector's fees. I do not so read the document. He approved whatever the vestry approved, and the vestry approved both tables, the total fees, and the rector's fees, and I think they were right in obtaining the approval of the bishop to both sets of fees, because it is provided by s. 37 of the Act of 1852 that for any fees excepted generally by other sections the approval, not only of the vestry, but of the bishop of the diocese, should be obtained.

The only other document was that which was approved in 1893 by the Secretary of State. So far as I can see, it contained the identical fees which, when added on to the rector's fees,

made up the total amount. It does no doubt appear from this examination of the documents that there are no extra fees anywhere levied for the direct purpose of being paid to the vestry. That is perfectly true; but is it shewn that no fees in respect of burials in unconsecrated ground are applicable under s. 36? I think not. The scheme of the Act seems to be to put for all purposes the fees and payments levied by and payable to the burial board in respect of burials in the new burial ground provided for the parish, in place of the former fees and payments for burials in the parish burial grounds, and to make them subject to the same rights. The old burial grounds were closed, and if the new burial ground was to be under a totally different rule, and fees levied there were not to be payable to the vestry, the vestrymen's rights would be passed over sub silentio. Upon the wording of s. 36 I think there is nothing of this kind, and that the fees actually levied by the burial board are payable to the vestry. I hold, therefore, that all the fees and payments to the burial board are subject to the provisions of s. 36. When I say all, I mean substantially all—I will not bind myself to say there is nothing outside that—substantially all the fees; the result being that the burial board have received money which ought to have been paid to the vestrymen for the parochial purposes directed by the Act of Geo. 3.

In quite recent times the vestry have levied a separate rate under the provisions in that behalf contained in the Act of 1868, it being provided by sect. 2 that where the purposes are partly ecclesiastical within the meaning of that Act (that is, for the repair of a church, which is the only thing we have to consider now)—that where the purposes are partly ecclesiastical and partly not, they may levy a separate rate for the non-ecclesiastical purposes, which is not to be dealt with as a church rate, or as within the Act in any way.

The result is that apparently a mistake has been made in form. Fees which were payable to the vestrymen have been paid towards the expenses of the board wrongfully in point of form, but in substance it comes to the same thing. You only have to alter the accounts, and treat any moneys which were paid for expenses as being paid to the vestrymen for the

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parochial purposes which they had to carry out, and then to throw the expenses themselves upon the general poor-rate.

Now, the only question being under this mandamus whether the churches are to be repaired (I do not say those are the exact words, but that is the substance) out of the rate to be levied, we decide that no rate can be levied, because the case does not fall within the exception of s. 5, but that, as regards the burial fees, they are applicable, as they were before the passing of the Act of 1852, so far as they are provided for, to the parochial purposes which were provided for by the Act of Geo. 3. There is no abolition as regards the payment of fees, and they ought to be so applied. Apparently, therefore, the form of the mandamus will be, as suggested by Lopes L.J., that the vestry should apply the burial fees payable to them by the board towards the repair of the churches. Counsel may wish to say something about the form of the mandamus, and I think if any question arises it had better be submitted to one of us.

LORD ESHER M.R. I concur entirely in the construction which has been put upon the statute, and in the result.

After some discussion it was arranged that the form of the mandamus should stand over for consideration.

Appeal dismissed.

Solicitors: *Ingle, Holmes & Sons*; *Clarkson, Greenwell & Co.*

W. L. C.

GOSLING *v.* NEWTON. GOSLING *v.* EAGERS. 1895 *March* 28.

Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*) —*Thames Conservancy By-laws—Qualification of Assistant Lighterman.*

A person who is duly bound as an apprentice to a freeman of the Watermen's Company or to a registered barge owner, in pursuance of the Watermen's and Lightermen's Act, 1859, is immediately from the commencement of his apprenticeship a qualified apprentice within the meaning of s. 54 of that Act, and entitled as such to act as an assistant lighterman within the limits of the Act, and is also a sufficient second hand to assist in the navigation of a craft of above fifty tons burden to satisfy the requirements of by-law 16 of the Thames Conservancy By-laws, 1872.

CASE stated by a metropolitan police magistrate.

On October 9, 1894, the barge *Sherwood*, of above fifty tons burden, was being navigated on the River Thames under the charge and control of the respondent Edward Eagers, who was then a lighterman duly licensed in pursuance of the Watermen's and Lightermen's Act, 1859. He was assisted in the navigation of the barge by the respondent Aaron Newton, an apprentice, duly bound in accordance with the provisions of the Watermen's and Lightermen's Act, and nineteen years of age, although he had in fact only served a few weeks of his apprenticeship. The respondent Newton was, in consequence thereof, summoned under s. 54 of the Watermen's and Lightermen's Amendment Act, 1859, for having acted as a lighterman without the qualification therein required, and the respondent Eagers was summoned under by-law 16 of the Thames Conservancy By-laws, 1872, for having navigated a craft of above fifty tons burden without having an additional man on board to assist in the navigation.

By the Watermen's and Lightermen's Amendment Act, 1859, s. 3, the term "lighterman" is defined to be "any person working or navigating for hire a lighter, barge, boat, or other like craft, within the limits of this Act."

Sect. 46 provides that freemen of the company or widows of freemen, and s. 47 that registered barge owners having in their employ a freeman or a licensed lighterman, may take apprentices to be instructed in the navigation of barges, &c.

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Sect. 48 provides that an apprentice at the date of his indenture must be over fourteen and under twenty years of age.

Sect. 52 provides that "It shall be lawful for all apprentices bound to a party authorized by this Act to take apprentices, to have or take the sole charge of any boat, barge, or other vessel, provided such apprentices shall have worked and rowed upon the said river as apprentices for the space of two years at the least; and upon their being found qualified to act, upon examination by the said Court, and upon obtaining a licence from the said Court, subject to an appeal to the Conservators of the River Thames, as is hereinafter provided with respect to licensed lightermen."

By s. 54, "If any person, not being a freeman licensed in pursuance of this Act, or an apprentice qualified according to this Act . . . . shall at any time act as a lighterman . . . . within the limits of this Act for hire or gain," he shall be liable to a penalty.

By s. 80, the Court of Master, Wardens, &c., are empowered to make by-laws for carrying into effect the purposes of the Act, "so that the same by-laws be not inconsistent with . . . . any of the by-laws made or to be made by the Conservators of the River Thames."

By by-law 35 of the by-laws made under the said Act in 1860, it was provided that, "In all cases in which it may be necessary under . . . . the by-laws of the Conservators of the River Thames . . . . that two able and skilful persons should be employed . . . . in vessels of more than fifty tons burden navigated on the river, one lighterman licensed in manner provided by such Act, or an apprentice licensed to take sole charge of craft, and an apprentice actually bound in manner provided by such Act, shall be taken to be able and skilful persons within the meaning of such by-laws."

This reference contained in this by-law was to a by-law of the Conservators of the Thames made in 1860, which has been since repealed, and for which the by-law 16 next hereinafter mentioned was substituted.

By by-law 16 of the Thames Conservancy By-laws, 1872: "All barges, boats, lighters, and other like craft . . . shall, when under way, have at least one competent man constantly on board

for the navigation and management thereof; and all such craft of above fifty tons burden shall, when under way, have one man in addition on board to assist in the navigation and management of the same."

The magistrate held that the respondent Newton was, by virtue of his mere apprenticeship, sufficiently qualified to satisfy s. 54 and by-law 16, and he accordingly dismissed the summonses, subject to a case for the opinion of the Court.

Gore Browne (*Cluer*, with him), for the appellant. As to the summons against Newton under s. 54, he was not entitled to act as a lighterman, for he was not "an apprentice qualified according to this Act" within the meaning of the section. The only section in the Act which uses the term "qualified" in connection with apprentices is s. 52, and the qualification there dealt with is the qualification to take sole charge of a craft, which can only exist in the case of an apprentice who has worked as such for two years. The word "qualified" in s. 54 must mean the same thing as it does in s. 52. If, as the magistrate held, an apprentice is qualified for the purposes of s. 54 the moment he is bound, then we are landed in this absurdity—that a lad of fourteen with no experience at all is entitled to do work which his own master, a freeman of the company, cannot do if he happens to be unlicensed, and which the apprentice himself will be unable to do after the expiry of his indenture, when he has acquired the experience which service for the full term of his apprenticeship is likely to give him.

Then as to the other summons against Eagers under by-law 16. It has been decided in two cases, *Perkins* v. *Gingell* (1), and *Goldsmith* v. *Slattery* (2), that the "one man in addition" who is to assist in the navigation of a craft of over fifty tons burden must be, like the man in sole charge of a craft of less tonnage, a "competent man." And there was no suggestion here that Newton was competent. It is true that in *Goldsmith* v. *Slattery* (2) Huddleston B. seems to have thought that an apprentice would be a sufficient "competent man" to act as second hand on a craft of over fifty tons. But it is evident from

(1) 2 Times L. R. 39. (2) 63 L. T. (N.S.) 273.

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the report of that case that he was under the impression that by-law 35 of the Watermen's Company's by-laws was a part of the Watermen's Act itself. In point of fact, that by-law has no bearing on the present question. Even assuming that its interpretation of the words "able and skilful persons" in the Thames Conservancy By-laws of 1860 can be treated as an interpretation of the words "one man in addition" in the Thames Conservancy By-laws of 1872, still it may be rejected as immaterial. For if that interpretation enlarges the natural meaning of the words "one man in addition," it is ultra vires and void under the provisions of s. 80 of the Watermen's Act above mentioned.

Finlay, Q.C., and *Scrutton*, for the respondents, were not called upon.

WRIGHT J. The question upon the summons against Newton is whether he was an apprentice "qualified according to this Act." I think he was. Those words "qualified according to this Act" must be taken to refer to ss. 46, 47, and 48, and must mean nothing more than being duly bound in accordance with those sections. Therefore, a lad who, being within the ages of fourteen and twenty, is bound apprentice to one of the persons who under those sections are authorized to take apprentices, becomes qualified for the purposes of s. 54 from the date of his indenture.

Then the summons against Eagers, though not under the same section, turns practically upon much the same considerations. By-law 16 of the Thames Conservancy By-laws requires that for the navigation of a barge of over fifty tons burden there shall be one competent man and one man in addition. And it has been contended that that requirement is not satisfied by having as second hand a lad who has only just commenced his apprenticeship, and that the cases cited establish that the "man in addition" must also be a competent man. What those cases decide is, that neither a longshoreman, nor a boy who is not an apprentice, is a competent man in addition for the purposes of the by-law. But in both the cases cited the judges who decided them seem to have thought that an apprentice duly

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bound would be sufficiently competent. The appeals must be dismissed.

CAVE J. concurred.

Appeals dismissed.

Solicitors for appellant: *Safford & Kent.*

Solicitors for respondents: *Wilson, Bristow, & Carpmael.*

J. F. C.

[CROWN CASE RESERVED.]

1895
April 6.

THE QUEEN *v.* BAKER.

Criminal Law—Perjury—Materiality.

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements.

The defendant had been charged with selling beer without a licence, and had falsely sworn that, when previously charged with a similar offence, he had not authorized a plea of guilty to be put in, and that such plea had been put in without his knowledge and against his will:—

Held that, as such statements affected the defendant's credit as a witness, they were material, and he was rightly convicted of perjury.

CASE stated by His Honour Judge Chalmers, sitting as Commissioner of Assize.

The defendant Baker was tried on February 9, 1895, at the Glamorganshire Assizes, on a charge of wilful and corrupt perjury.

The substance of the indictment was that, on December 18, 1894, at the petty sessions held at Cardiff before the stipendiary magistrate, he, Baker, was charged with the offence of selling beer without a licence, and, having been duly sworn, deposed that he had never authorized the plea of guilty to be put in to a previous charge of selling beer without a licence, contrary to s. 3 of the Licensing Act, 1872 (1), on November 6, 1894, and that he had not authorized his solicitor to put in the plea of guilty to the charge, even by an indirect authority, and that he had no knowledge that his solicitor was going to plead guilty

(1) 35 & 36 Vict. c. 94.

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on his behalf, and that it was against his wish and will that the plea of guilty was put in.

It was proved before the commissioner that, at the hearing before the stipendiary magistrate, the defendant swore as follows, namely, that he had been previously convicted of selling beer without a licence, on November 6, 1894, and that the conviction was in respect of the same premises, and that he had never authorized the plea of guilty to be put in on November 6.

He then proceeded to swear as follows:—

"I was at the police court at 11 A.M. on November 6. I met my solicitor Mr. Belcher outside. He said, 'Your case won't come on for an hour.' I said, 'Will you send for me when wanted.' I then took the witnesses to the Black Lion Hotel, and had not been there ten minutes when Jacobs came in and said the case was over, and that Belcher had pleaded guilty. I was very much annoyed, as I had given no authority to plead guilty, not even indirect authority. I was surprised at the information I received. I went with Belcher to the office, and remonstrated with him, as it was against my wish the plea of guilty was put in. Belcher did not tell me that he would not go into Court unless a plea of guilty was put in."

Evidence was called on behalf of the Crown to shew that the defendant, after full explanation of the matter, had authorized his solicitor, Belcher, to plead guilty on his behalf, and that when he was informed of what had been done he expressed himself as perfectly satisfied with the result.

At the conclusion of the case for the Crown, counsel for the defendant took the objection that, even if the statements made by Baker were knowingly false, they could not amount to perjury, because they were not material to the issues then pending before the stipendiary magistrate.

(The three grounds relied on by counsel for the defendant, which were set out in the case, are stated and dealt with in the judgment of the Lord Chief Justice, post, at p. 799.)

The commissioner held that Baker, having tendered himself as a witness (1), was properly examined at that stage of the proceedings concerning the circumstances of his previous conviction,

(1) Under 35 & 36 Vict. c. 94, s. 51, sub-s. 4.

and that his answers were material, inasmuch as, in the event of a conviction, the facts deposed to would be taken into consideration by the magistrate in the ultimate determination of the case; but he said he would state a case on the objections raised.

The jury found the defendant guilty.

The question for the opinion of the Court was whether the above statements of the defendant were material to the issues then depending before the stipendiary magistrate.

No counsel appeared for the defendant, nor did he appear in person.

C. J. Jackson, for the prosecution, was not called upon.

LORD RUSSELL of KILLOWEN C.J. The sole point for our consideration in this case is whether the statements made by the defendant, which the jury have found to have been made falsely and wilfully, were material to the case which was before the stipendiary magistrate when the defendant was charged for the second time with the offence of selling beer without a licence. I will take the grounds relied on for the defendant in the order in which they are stated in the case. The first ground taken is that, as the defendant had admitted his previous conviction, and had not appealed therefrom, it was immaterial to the then pending inquiry whether the previous plea of guilty had been put in by the defendant's consent or not. The answer to that contention is that the defendant's answers would affect his credit as a witness, and all false statements, wilfully and corruptly made, as to matters which affect his credit, are material. The magistrate may be influenced, in arriving at his decision, by the circumstances of the previous conviction, and, if the defendant's solicitor had pleaded guilty on his behalf without his knowledge or consent, that circumstance might have been taken into consideration as affecting the amount of punishment. The second ground taken is that the previous conviction could only become material when the magistrate decided to convict in the then pending proceeding, and that, as a fact, the proceedings had been adjourned to await the result of the prosecution for perjury. I do not see the relevance of that argument. The magistrate

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must consider the case on the evidence given before him, and the circumstances may have an influence on the punishment. If on the previous occasion the defendant had, as he alleged, been convicted per incuriam, the magistrate might have given him the benefit of that fact, and might have treated the subsequent charge as if it had been a charge of a first offence. The third ground taken is that a previous conviction only affected the amount of punishment to be awarded by a magistrate, and not any issue to be determined by him, and further that the magistrate could only take cognizance of the fact of the previous conviction, and not of the circumstances under which it took place. But, as I have already pointed out in dealing with the previous objections, it is wrong to suggest that the magistrate could only take cognizance of the fact of the previous conviction. For these reasons I am of opinion that the words stated in the case were material. I will deal shortly with the authorities. In *Reg.* v. *Overton* (1) the date of a receipt which had been given for the price of a greyhound was held to be material. Patteson J. so held, after consulting Parke B., on the ground that every question on cross-examination of a witness which goes to his credit is material. The case afterwards came before a Court consisting of eleven judges, who supported the view adopted by Parke B. and Patteson J. In *Reg.* v. *Lavey* (2), where a plaintiff in a county court had falsely sworn that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station, the evidence was held to be material. This, again, was on the ground that it affected her credit. In *Reg.* v. *Gibbon* (3) it was held by eleven judges, Martin B. and Crompton J. doubting, that perjury might be assigned on evidence going to the credit of a material witness in a cause, although such evidence, being legally inadmissible, ought not to have been received. That is a very strong authority—much stronger than is needed to support the conviction in the present case. I am of opinion that the evidence was material, and the conviction was right, and ought to be affirmed.

(1) Car. & Marsh. 655.

(2) 3 C. & K. 26; and see 21 L. J. (M.C.) 10.

(3) L. & C. 109.

HAWKINS J. I entirely agree for the reasons given by the Lord Chief Justice. 1895

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CAVE, GRANTHAM, and LAWRANCE JJ. concurred.

Conviction affirmed.

Solicitors for prosecution: *Riddell, Vaizey, & Smith, for J. L. Wheatley, Town Clerk of Cardiff.*

P. B. H.

THE QUEEN *v.* JUSTICES OF DURHAM.

1895
March 29.

Justices—Practice — Appeal — Court of Summary Jurisdiction — Appeal to Quarter Sessions—Recognisance—Court before which recognisance to be entered into—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 3.

By the Summary Jurisdiction Act, 1879, s. 31, sub-s. 3, the appellant from an order of a court of summary jurisdiction shall "enter into a recognisance before a court of summary jurisdiction" to prosecute such appeal:—

Held, that the recognisance may be entered into before any court of summary jurisdiction, whether acting for the same county as the Court from whose order the appeal is brought, or not.

ORDER NISI for a mandamus to the justices for the county of Durham.

On November 8, 1894, at the Houghton-le-Spring Petty Sessions, in the county of Durham, an order was made on one William Newton, on the application of Mary Jane Merrington, to pay a certain weekly sum towards the maintenance of an illegitimate child.

Within seven days of that order Newton gave notice of his intention to appeal against the order to the quarter sessions for the county of Durham, and three days after so giving notice he went before a justice of the peace for the county of Northumberland—in which county he resided—and entered into a recognisance with one surety to prosecute his appeal.

On the appeal coming on for hearing before the quarter sessions for the county of Durham, objection was taken that the recognisance, having been entered into before a justice of the

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peace of another county and not before the Court which had made the order, had not been properly entered into. The quarter sessions upheld the objection and declined to entertain the appeal. Newton then obtained this order nisi calling on the justices to shew cause why a mandamus should not issue commanding them to enter continuances and to hear and determine the appeal. (1)

Scott Fox shewed cause. The objection was good. The recognisance ought to have been entered into either before the same court of summary jurisdiction as made the order, or at any rate before a court of summary jurisdiction for the same county. If the appellant may go into another county it cannot be likely that a justice of that county would know anything about the case, and without such knowledge he cannot fix either the amount of the recognisance or the number of the sureties. These are the important elements, as is shewn by s. 42 of the Summary Jurisdiction Act, 1879, which allows recognisances to be entered into out of court provided that the question of the amount in which the principal and the sureties (if any) are to be bound has been first fixed by the court of summary jurisdiction.

John Strachan, in support of the order. The objection was bad. The Summary Jurisdiction Act, 1879, recognises the difference between "a Court" and the Court which made the order or a Court acting for the same county as the Court which made the order. That is apparent from the different expressions used in many of the sections: see s. 9, sub-ss. 1, 2; s. 26; s. 31, sub-ss. 2, 4, and 5. By 8 & 9 Vict. c. 10, s. 3, notice of the recognisance had to be given to the justices who made the order. That section has been repealed and the present procedure substituted for it; so that the legislature have deliberately

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 3, "The appellant shall within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognisance before a court of summary jurisdiction, with or without a surety or sureties as that court may direct, conditioned to appear at the said sessions and to try such appeal and to abide the judgment of the court of appeal thereon, and to pay such costs as may be awarded by the court of appeal."

By s. 54, "This Act shall apply . . . to an appeal from an order in any matter of bastardy."

intended to allow any court of summary jurisdiction to fix the amount of the recognisance, and it is certainly for the public convenience that it should be so. [He referred to *Reg.* v. *Justices of Anglesey.* (1)]

CAVE J. I am of opinion that in this case the mandamus ought to go. The appeal came before the quarter sessions for the county of Durham in the ordinary course. The parties were there and their witnesses; and there was nothing to prevent it from being heard. But some one on behalf of the woman took the objection that, since the recognisance had been taken in the county of Northumberland, and not in the county of Durham, in which the order had been made, it had not been properly entered into. That point was argued out before the court of quarter sessions; and they decided in favour of the objection, and consequently declined to hear the appeal. We have now to decide whether or not they were justified in so doing.

The governing statute is the Summary Jurisdiction Act, 1879, which by s. 31, sub-s. 3, provides that the appellant shall, within three days of the day on which he gave notice of appeal, "enter into a recognisance before a court of summary jurisdiction, with or without a surety or sureties as that Court may direct," to appear at the sessions and prosecute such appeal. The contention is that the words "a court of summary jurisdiction" in this sub-section mean, either the Court which made the order appealed against, or at any rate a court of summary jurisdiction for the same county as that Court. Primâ facie, the words "a Court" mean any Court; and I think that, when the rest of the section is read, it becomes perfectly clear that the words have not any such limited meaning as has been contended for. On looking through the section it is plain that the words are qualified wherever it was intended that the Court in question should be either the Court which made the order, or another Court of the same county. Thus in sub-s. 4, "the court of summary jurisdiction before whom the appellant appears to enter into a recognisance" is referred to; and in sub-s. 5 power is given to remit the matter "to a court of summary jurisdiction acting for the

(1) [1892] 2 Q. B. 29.

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same county, borough, or place as the Court by whom the conviction or order appealed against was made."

The fact that these different expressions are used in the very same section is a strong argument to shew that the difference between "a Court," "the Court by whom the order was made," and "a Court acting for the same county as the Court by whom the order was made," was present to the mind of the legislature, and therefore that when they use the words "a court of summary jurisdiction" they must be taken to intend that which the words naturally mean, that is to say, "any court of summary jurisdiction." Common sense and the reason of things point in the same direction. If the Court before whom the recognisance must be entered into was to be the Court by whom the order was made, the greatest difficulty might be experienced by the appellant in getting together the magistrates who had composed that Court, and in doing so within the prescribed time; while, if the Court was to be any Court acting for the same county, it is quite possible that the appellant might reside in some distant county, and would then be compelled to take a long journey, bringing his sureties with him, in order to tender a recognisance before a bench of magistrates who would naturally know nothing of his position or that of his proposed sureties. In the present case the appellant went before a magistrate who resided in the same district, and who would be much more likely to know the means of the appellant and his sureties than any justices of the county of Durham, in which the appellant did not reside.

It seems to me quite clear that the words were intended to be read according to their primâ facie meaning, and that the appellant had a right to go before any court of summary jurisdiction in order to enter into a recognisance.

The objection taken before the court of quarter sessions was, therefore, bad, and they ought to have heard the appeal.

WRIGHT J. I am of the same opinion, although with some diffidence. In the absence of any direct authority, we must be guided by the bare letter of the statute, unless there is something in it to modify the ordinary meaning of the words used. The sub-section speaks of "a court of summary jurisdiction," and it

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certainly seems to me to be more for the public convenience that a man should be allowed to enter into such a recognisance in the neighbourhood in which he lives rather than that he should be compelled to do so in any particular Court. The decision in *Reg.* v. *Justices of Anglesey* (1) is, I think, an authority for saying that no Court ought to allow such a recognisance to be entered into without having all the proper materials before it.

Order absolute.

Solicitors for the appellant: *Belfrage & Co.*
Solicitors for the respondent: *H. Nelson Paisley.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.

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March 25.

THE QUEEN ON THE PROSECUTION OF THE MAYOR, &c., OF THE BOROUGH OF ROTHERHAM *v.* THE COUNTY COUNCIL OF THE WEST RIDING OF YORKSHIRE.

Local Government—Police—Cost of Pay and Clothing—Borough maintaining Separate Police Force—Constables added from another Force—Contribution by County Council—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), s. 24, *sub-s.* 2 (*j*)—*Police Act*, 1890 (53 & 54 *Vict.* c. 45), s. 25.

A borough which maintains a separate police force is entitled to be paid by the county council, under s. 24, sub-s. 2 (*j*), of the Local Government Act, 1888, one-half of the cost of the pay and clothing of extra police temporarily added from another police force under s. 25 of the Police Act, 1890, and paid for by agreement under that Act.

RULE NISI for a writ of mandamus.

The borough of Rotherham maintained a separate police force, and in 1893, owing to strike riots, the watch committee of the town council obtained additional police-constables from the metropolitan police force under an agreement made, under s. 25 of the Police Act, 1890 (2), with the commissioner of the

(1) [1892] 2 Q. B. 29.

(2) The Police Act, 1890 (53 & 54 Vict. c. 45), s. 25:—

"(1.) Where a police authority deem it expedient for any special emergency or under any exceptional circumstances to strengthen their police force (in this section referred to as the aided force) by constables belonging to another police force, such number of constables belonging to the latter force may be added to the aided force, and for such period as may be agreed on between the police authorities of

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metropolitan police. By that agreement the town council agreed to pay to the receiver for the metropolitan police district "the pay and allowances of the constables thus added, and such further sums as the commissioner shall certify to have been expended in the travelling expenses of the added constables for conveyance of prisoners taken into custody by them, in making good damage done to their clothing, for the hire and keep of the horses and use of vans, and all other expenses (including a reasonable charge for administrative expenses and for the superannuation of the constables) which the commissioner shall certify to be incidental to the carrying out of this agreement."

For a period in the year 1893 ending on September 29 the town council paid to the receiver, in pursuance of the agreement, the sum of 640*l.*, in respect of the added constables. For the year ending on that date the town council sent to the county council an account of the cost of the pay and clothing of the police force of the borough, which included the above sum of 640*l.*, and claimed payment of one-half of the total cost from the county council under s. 24, sub-s. 2 (*j*), of the Local Government Act, 1888. (1)

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the forces; and the constables so added, notwithstanding that they have not been sworn in or taken any declaration as constables of the aided force, shall, during that period, be deemed, save as otherwise provided by the agreement, to be for all purposes constables of the aided force, and shall have the like powers, duties, and privileges.

"(2.) The agreement may be made for a particular occasion or as a standing agreement, and with reference either to recurring or to unforeseen events, or otherwise, as may be thought expedient.

"(3.) Any powers conferred on a police authority by this section or by any agreement made thereunder may (subject to anything in the agreement to the contrary) be delegated by that authority to their chief officer of police by any general or special order, and with or without any exceptions, restrictions, or conditions.

"(4.) An agreement under this section may contain such terms as to the command of the constables added to the aided force, and as to the expenses (including the pay and allowances of the constables so added and provision for pensions, gratuities, and allowances in the event of those constables being killed or injured) and otherwise, as may seem expedient.

"(5.) An agreement may be made by a police authority with more police authorities than one."

(1) The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24:—

"Whereas certain grants heretofore made out of the exchequer in aid of local rates (in this Act referred to as local grants) will, by reason of the

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The county council refused to pay any part of the sum of 640*l.*, upon the ground that they were not liable to make any repayment in respect of extra police borrowed from other forces. This rule nisi for a mandamus to the county council to pay the sum of 320*l.* to the town council was thereupon obtained.

[During the course of the argument it was agreed that any objection in form to the proceeding by rule for a mandamus should be waived, but that the county council should be at liberty to dispute the amount of the claim.]

1895. Jan. 25. *Sir R. E. Webster, Q.C.*, and *Roskill*, for the county council, shewed caused against the rule. The provisions of s. 24, sub-s. 2 (*j*), of the Local Government Act, 1888, transfer to the county council the obligation to pay a certain portion of the expenses of the police force of a borough which was formerly paid by a Secretary of State. That does not apply to the cost of any extra police called in from another police force to temporarily increase the police force in question. If the argument of the applicants were right, the extraordinary result would follow that the aided force might obtain repayment in respect of added constables whilst the aiding force was also obtaining repayment in respect of the same constables from another county council. In this case the receiver of the metropolitan police will receive repayment of one-half of the cost of these very constables. The words at the end of s. 25, sub-s. 1, of the Police Act, 1890, "the constables so added shall be deemed to be for all purposes constables of the aided force," do not apply for the purpose of making the county council liable to pay one-half the cost; those words only deal with any dis-

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duties on the local taxation licences and the probate duty grant being by this Act made payable to local authorities, cease, it is therefore hereby enacted as follows:—

* * * *

"(2.) In substitution for local grants the council of each county shall from time to time as from the said day pay out of the county fund and charge to the exchequer contribution account the following sums, that is to say—

* * * *

"(*j*) They shall, subject to the provisions of this Act, pay to the council of each borough maintaining a separate police force under the County and Borough Police Acts, one-half of the costs of the pay and clothing of the police of that borough during the preceding year."

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ability that might otherwise attach to such constables when acting as part of another police force.

Crump, Q.C., and *A. Macmorran*, for the town council, were not heard.

WILLS J. The question in this case is a very short one. It is whether s. 25 of the Police Act, 1890, which says that the constables added from one police force to another police force "shall be deemed to be for all purposes constables of the aided force," is to be read as if the words "for all purposes" do or do not mean what they say. It seems to me that we ought to construe those words in their natural sense, unless that construction leads to some absurdity. I cannot see that any such consequence would follow in this case. The words "for all purposes" here include in my opinion the purpose of pay. The Rotherham Corporation has, in effect, paid the wages of the extra police; payment has been made to the receiver of the metropolitan police; but that is merely a machinery for payment, and the payment has none the less been made by the Rotherham Corporation. It therefore seems to me that the present case comes directly within the words of the statute which gives the right to have part of the cost paid by the county council. It is said that this result may lead to injustice, and that the metropolitan police will get a grant of half the expenses which they have not really paid, inasmuch as they have been paid by Rotherham. I do not know how that may be. If it is so, the attention of the authority which may have to pay the grant to the metropolitan police should be called to the matter. That consideration, however, has nothing whatever to do with the present case, and cannot affect our decision. The question is whether Rotherham, which has paid for these police, is entitled to receive half the amount of their pay from the West Riding County Council. I am of opinion that Rotherham is so entitled. It must be conceded that, if Rotherham, instead of getting police from London, had enrolled new men for the same period, there could not be any question about the liability of the county council. I cannot think that, because the addition has been made by borrowing from an effective police force, there can be

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any difference. It has been agreed that there shall be no dispute as to the form of this application, and therefore the rule will be made absolute; but it is understood that the county council may dispute the amount, and are to be liable to pay only half the true cost of the pay and clothing of the extra police.

WRIGHT J. I cannot help thinking that the question is so clear as to be almost unarguable, and that some part, at any rate, of the cost of the extra police is payable by the county council.

Rule absolute.

W. A.

The defendants appealed.

1895. March 25. *Lawson Walton*, *Q.C.*, and *Roskill*, for the defendants. The added constables were not part of the police force of the borough within the meaning of the Local Government Act, 1888, s. 24, sub-s. 2 (*j*). The force there intended is the permanent force employed by the borough authority. The Police Act, 1890, does not bring the added force within the definition of a force for whose pay and clothing the borough is responsible. It is true the added force is to be deemed to be part of the aided force for all purposes "save as otherwise provided by the agreement"; but this, as indicated by the section, is for the purpose of preventing the necessity for swearing in the added men, and to put them on the same footing for purposes of discipline and in carrying out their duties as the men of the aided force, except in so far as the agreement may provide for their being under command of their own officers, or not having to perform certain indicated duties, or the like. The agreement between the two police authorities can deal with matters of discipline, but cannot cast on the county council the duty of providing for half the extra expense out of the funds at their disposal. These men never ceased to be metropolitan constables, and the metropolitan police authority could treat them as such when making up their claim for contribution out of the Exchequer contribution account, so that these men would be paid for twice over. Such a result shews that the Police Act, 1890, cannot

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have been intended to enlarge the definition of borough police as indicated in the Local Government Act, 1888.

Crump, Q.C., and *A. Macmorran*, for the prosecutors, were not called on.

LORD ESHER M.R. The first thing we have to do is to construe s. 24 of the Local Government Act, 1888. That Act enables the council of each county to do a number of things, among others to pay to the council of each borough maintaining a separate police force one half of the cost of the pay and clothing of the police of that borough during the preceding year. That, of course, means the cost of the permanent police force when that is the only one maintained by the borough, and that is what it meant when the Act passed; special constables who might be called on did not come within the sub-section. Under the Police Act, 1890, s. 25, we find authority given when there is a special emergency, or under exceptional circumstances, to strengthen a police force by constables belonging to another force, who are to be added to the aided force. If men are added to a force it will consist of those men originally belonging to it and those added to it; but to make it perfectly clear what is to be the effect of the addition of men belonging to another force, the section says that the added men are to be deemed, save as otherwise provided by the agreement between the police authorities of the forces, "to be for all purposes constables of the aided force." I do not see how the language could be plainer. The added men are to be deemed part of the aided force, and we have to go back to the Act of 1888 and apply it to the police force of the borough composed of the men originally belonging to it and the men who have been added and are deemed to be part of it. The 4th sub-section of the 25th section of the Police Act, 1890, declares what matters may be made the subject of agreement between the two authorities, and under the agreement in this particular case the borough of Rotherham undertook to pay the expenses of the added constables. This agreement they have carried out, and they have paid for the added men, and are entitled to receive half the amount so paid from the county council. The appeal must therefore be dismissed.

LOPES L.J. I think this case is a very clear one. The Local Government Act, 1888, did not contemplate the case of constables borrowed by one police authority from another. The Police Act, 1890, does contemplate such a borrowing, and provides that where it takes place the added men are to be deemed, for all purposes not excluded by agreement, to be constables of the aided force. The added men are thus brought within the terms of the 24th section of the Local Government Act, 1888, as police of the borough. It seems to me to be quite clear that the expression "all purposes" includes the payment of the men, and that the added men become constables of the aided force for the purpose of payment, unless that matter is excluded by the agreement between the authorities. There is no such exclusion in the present case, and the judgment of the Divisional Court should be affirmed.

RIGBY L.J. I am of the same opinion. The question arises on the construction of two Acts of Parliament. As to the first, the Local Government Act, 1888, it has been contended that the added force was not, under the terms of s. 24, sub-s. 2 (*j*), part of the police of the borough. It is suggested that the introduction into that sub-section of the word "clothing" indicates that what is being described is a force that must be clothed by the borough. I cannot agree with that view. When there is no clothing required there is none to be paid for, but that would not affect the nature of the force. The argument that the expression "pay and clothing" is descriptive of the force would go to this length, that if no allowance can be claimed in respect of clothing none could be claimed in respect of pay.

The Police Act, 1890, allows on an emergency the temporary increase of a police force, either of a county or a borough, and provides that the borrowed force is to be deemed for all purposes to be part of the aided force. I can see no reason why a restricted meaning should be placed on these words, or why the purpose of payment should be excluded. It is said that, if among the purposes for which the added force becomes part of the aided force the payment of the former is included, the authority to which the added force belongs may get paid twice over. I do

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not think that could happen. The authority given by s. 24 of the Local Government Act, 1888, is to charge on the Exchequer contribution certain sums, and among others one half of the cost of the pay and clothing of the police of the county (under sub-s. 2 (*i*)), and of a borough (under sub-s. 2 (*j*)). It is idle to say that where money has been received from some authority which has borrowed a part of the force the cost of the force can be calculated without taking into account the money so received. In my opinion, the judgment of the Divisional Court was clearly right.

Appeal dismissed.

Solicitors for prosecutors: *Stevens, Bawtree, & Stevens, for H. H. Hickmott, Rotherham.*

Solicitors for defendants: *Badham & Williams, for Trevor Edwards, Wakefield.*

A. M.

C. A. 1895 *March* 15.

[IN THE COURT OF APPEAL.]

IN RE OTWAY. EX PARTE OTWAY.

Bankruptcy—Receiving Order—Refusal to make Order—"Sufficient Cause"—Cesser on Bankruptcy of Bankrupt's Interest in only Asset—Attempt of Petitioning Creditor to extort Money—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.

A debtor had a life interest, which ceased on bankruptcy, in the income of certain property. He had no other property. He proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance, and paying his creditors a composition of 10*s.* in the pound. The petitioning creditor did not agree to this proposal, and a receiving order was made on his petition. On appeal:—

Held, that the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made.

The petitioning creditor endeavoured to obtain 25*l.* from the debtor as a condition for agreeing to an adjournment of the petition:

Held, that as the petitioning creditor had made the petition a means of endeavouring to extort money from the debtor, no receiving order ought to be made on it.

APPEAL against a receiving order made by a registrar in bankruptcy.

It appeared from affidavits of the debtor that he was entitled

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under the will of his mother to a life interest in three-eighths of her residuary estate, estimated to produce 1500*l.* a year. The will contained a clause that if the debtor should become bankrupt, or assign, anticipate, or incumber the income bequeathed by the will, he should lose the beneficial enjoyment thereof. The debtor alleged that he had no other property except such income.

A meeting of creditors was held, at which a proposal was made that one half of the income under the will should be received by the debtor, and that the costs of an insurance to be effected by him should be paid out of the other half, and the residue applied, in the first instance, in payment of 10*s.* in the pound on all debts under 200*l.*, and afterwards in payment pro ratâ of other creditors, until they should have received a dividend of 10*s.* in the pound. In case of the death of the debtor the creditors were to be entitled to the proceeds of the policy to be divided among them pro ratâ. No resolution was then come to, and the meeting was adjourned. One of the creditors declined to agree to the proposal, and presented a petition, the hearing of which was adjourned. At the adjourned hearing the petitioning creditor made an offer to the debtor and his solicitor that if the former would give him 25*l.* for himself he would consent to the further adjournment of the petition. This offer was declined. At a subsequent date the proposal of the debtor was agreed to by the creditors present at the adjourned meeting. Ultimately the registrar made a receiving order against the debtor on the petition of the petitioning creditor.

The debtor appealed.

Muir Mackenzie, in support of the appeal.

F. Cooper Willis, contra.

LORD ESHER M.R. It seems to me that both points taken and made out are against the propriety of this petition being allowed to stand. One point is that the petitioning creditor holds out his hand, and says, "If you will give me 25*l.*, I agree to an adjournment." Is it an honest proceeding on the part of the petitioning creditor in a bankruptcy that he should be putting into his

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Lord Esher M.R.

pocket 25*l.* in this manner? The case cited to us, *In re Atkinson, Ex parte Atkinson* (1), decides that such a transaction is a fraud on the other creditors and a fraud on the Bankruptcy Court. Though this petitioning creditor did all he could to commit a fraud he did not do it effectually, because the 25*l.* was not forthcoming; but he did all he could to get the money; and in so doing he was committing a fraud, and on that ground, and that ground alone, he could not be allowed to go on with the petition.

Then, upon the other point, it seems to me to be clear that to let this petition go on would be doing what is called in *Ex parte Robinson, In re Robinson* (2), a vain thing; and, if that is true, that case says the Bankruptcy Court ought not to allow things to go on, and that the petition should be put an end to. Now here the evidence is clear that if there is this bankruptcy the only asset out of which the bankrupt can pay any creditors, including the petitioning creditor, is an asset which by the bankruptcy is put an end to, and nothing is left. The case comes within s. 7, sub-s. 3, of the Bankruptcy Act, 1883, which says that there are sufficient causes, besides those specially named in the section, for which the Court may come to the conclusion that no order ought to be made, and that the petition should be dismissed.

This is an evident effort on the part of the petitioning creditor to get payment of his debt from some one or other on the ground that if the bankruptcy proceedings go on the 1500*l.* a year will be gone. The objections to the petition are conclusive, and it must be set aside.

LOPES and RIGBY L.JJ. concurred.

Appeal allowed.

Solicitors: *Michael Abrahams, Son & Co.; A. J. Benjamin.*

(1) 9 Morr. 193.

(2) 22 Ch. D. 816.

A. M.

THE QUEEN *v.* SAMUEL AND ANOTHER.

1895
April 2, 10.

Thames Conservators—Election—Vote by Proxy—Body Corporate—Vote by Shareholder or Officer—Duties of Returning Officer—Judicial Act—Error or Irregularity in Election—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 22, 23, 25.

By the Thames Conservancy Act, 1894, s. 22, "A vote at any election of any conservator by shipowners . . . may be given either by the elector personally or by another elector as his proxy, or in case of a body corporate, by any shareholder or officer of the body as their proxy."

By s. 23, "The returning officer shall, according to the best of his judgment and ability, make a true return in writing, to the conservators, of the person or persons elected, and every person so returned shall be deemed duly elected."

By s. 25, "Any election by shipowners . . . shall not be invalidated or be illegal . . . by reason of any . . . error or irregularity in or about any election, or in or about any matter preliminary or incidental thereto."

At an election of conservators by shipowners the returning officer received and counted proxies given by bodies corporate to electors who were not shareholders in or officers of those bodies.

On an application for an information in the nature of a quo warranto:—

Held, that the only way in which a body corporate could exercise its right of voting by proxy was by a shareholder or officer, and therefore the proxies had been wrongly received.

But, *held*, that, by the terms of s. 23, the returning officer in making his return had acted judicially, and the return was conclusive.

Held, also, that the improper reception of the proxies was such an "error or irregularity" as was contemplated by s. 25, and therefore could not invalidate the election.

A RULE had been obtained, at the instance of the Portallock Shipping Company, Limited, calling upon Marcus Samuel and Cory Francis Wright to shew cause why an information in the nature of a quo warranto should not be exhibited against them to shew by what authority they claimed to exercise the office of Conservators of the River Thames elected by shipowners under the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), on the ground that votes given in their favour by means of proxies given by corporate bodies to electors, who were not shareholders in or officers of such corporate bodies, had been received and counted at such election by the returning officer.

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The provisions of the statute, on the construction of which the decision turned, are set out in the judgment.

April 2. *Joseph Walton, Q.C.*, and *Danckwerts*, for the defendant Samuel, shewed cause. The proxies were rightly received and counted. By s. 22 of the Act, "A vote at any election of any conservator by shipowners . . . may be given either by the elector personally or by another elector as his proxy." Those words are not confined to individuals, but are wide enough to include corporations, and therefore any corporate body is entitled to give a proxy to any elector, whether such elector be a shareholder in or officer of such corporate body or not. It is true that the section continues, "or, in case of a body corporate, by any shareholder or officer of the body as their proxy"; but this does not limit the right of voting conferred by the earlier part of this section, but only creates an additional mode of voting in the case of bodies corporate. Secondly, by s. 23, the return made by the returning officer is an act done by him in a judicial capacity, and is therefore final. This proposition is supported by the use of the words "to the best of his judgment and ability," and is established by a series of decisions on words in all cases more or less similar to those of s. 23: *Cullen* v. *Morris* (1); *Rex* v. *Trevenen* (2); *Rex* v. *Slythe* (3); *Rex* v. *Parry* (4); *Reg.* v. *Owens* (5); *Reg.* v. *Diplock* (6); *Reg.* v. *Collins.* (7) If there was any error or irregularity it is cured by the express words of s. 25.

C. H. Cripps, Q.C. (*Scrutton*, with him), in support of the rule. The proxies were wrongly received. Sect. 22 expressly defines the only way in which a body corporate can vote, namely, "by any shareholder or officer of the body as their proxy." The return is not a judicial act. This point depends entirely on the words of s. 23, and decisions upon different words do not affect the case. The misreception of the proxies is not such an "error or irregularity" as is contemplated by s. 25, and is therefore fatal to the validity of the election.

Cur. adv. vult.

(1) 2 Stark. 577.
(2) 2 B. & A. 339.
(3) 6 B. & C. 240.
(4) 6 A. & E. 810.
(5) 2 E. & E. 86.
(6) Law Rep. 4 Q. B. 549.
(7) 2 Q. B. D. 30.

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THE QUEEN v. SAMUEL.

April 10. The judgment of the Court (Cave and Lawrance JJ.) was delivered by

LAWRANCE J. In this case a rule was obtained against Marcus Samuel and Cory Wright, calling upon them to shew cause why an information in the nature of a quo warranto should not be exhibited against them, to shew by what authority they claim to exercise the office of Conservators of the River Thames, elected by shipowners under the Thames Conservancy Act, 1894 (57 & 58 c. clxxxvii.), on the ground that votes given in favour of the said M. Samuel and C. Wright, by means of proxies given by corporate bodies to electors not shareholders or officers of such corporate bodies, were received and counted at the election by the returning officer. The rule was obtained at the instance of the Portallock Shipping Company, Limited.

The statute empowers certain persons therein named, including among others shipowners, to vote for conservators of the River Thames, each class having the right to return a certain number to the board.

By s. 12 the qualification of shipowners is defined, and they are divided into two classes, A and B, class A being owners of 250 tons of shipping registered in the port of London, and class B being owners of the same amount of shipping registered at any other port than London, but having a place or places of business within the administrative county of London, and entering the port of London at least once a year.

An election of conservators took place on December 5, 1894, when Samuel and Wright were returned as having been elected by the shipowners. Objection was made to the return on the ground that some of the votes given by certain corporate bodies were invalid by reason of their having voted in a manner not sanctioned by the Act.

Sect. 13 provides for the making out of lists of shipowners of both classes, and the manner in which claims are to be sent in.

By s. 22, "A vote at any election of any conservator by shipowners, by owners of sailing barges, lighters, and steam-tugs, by dock-owners, or by wharfingers, may be given, either by the elector personally, or by another elector as his proxy, or, in case of a body corporate, by any shareholder or officer of the

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body as their proxy." This section deals with the manner in which voting by shipowners or corporate bodies is to be conducted.

By s. 23, "The returning officer shall, according to the best of his judgment and ability, make a true return in writing, to the conservators, of the person or persons elected, and every person so returned shall be deemed duly elected." This section defines the duties of the returning officer.

On behalf of the defendants it was urged that bodies corporate were entitled to vote in the same manner as shipowners, owners of sailing barges, lighters, and steam-tugs, dock-owners, and wharfingers—namely, by another elector as proxy—and that the words "or in case of a body corporate by any shareholder or officer of their body as their proxy" conferred a right of voting in addition to their right of voting in the same manner as that prescribed in the section as applicable to the other class of voters mentioned in the earlier part of the section. We are unable to accede to this view, and we are of opinion that the only way in which a body corporate can exercise its right of voting by proxy is by any shareholder or officer of the body. It was contended that this view of the section would entail a hardship on bodies corporate, as their principal places of business might be at a considerable distance from London; but it is to be observed that it is a condition precedent to their right of voting that they should have a place or places of business in the administrative county of London, and in all probability some officer connected with such place of business who would be qualified to vote as proxy. The words of the section are clear and distinct, and we are of opinion that the returning officer did not take a correct view of the provisions of the section.

It was contended, secondly, that, assuming the returning officer was wrong in his view of the provisions of the 22nd section, by ss. 23 and 25 his return was final, and that no information in the nature of a quo warranto would lie, as his duties are by s. 23 judicial, and not ministerial, and numerous cases were cited to shew that under those circumstances his decision is final. It is unnecessary to refer more particularly to the cases which establish the principle contended for, but it may be

remarked that both the words of s. 23 and those of s. 25 are much stronger than any words contained in the statutes on which the cases which were called to our notice were decided. No contention was raised on the part of the relators that the returning officer had not complied with the requirements of s. 23, and, if that section stood alone, we should have been of opinion that the returning officer had acted judicially in the matter, and that his return was conclusive.

Sect. 25, however, provides that "Any election by shipowners, &c., shall not be invalidated or be illegal by reason of any error in any list of voters, or by reason of any irregularity in the making or publishing of any such list, or by reason of any other error or irregularity in or about any election or in or about any matter preliminary or incidental thereto," and we think that the reception and counting of the votes complained of by the returning officer was precisely one of such errors or irregularities "in or about" an election "or in or about" a "matter . . . . incidental thereto."

Under these circumstances we are of opinion that the rule should be discharged.

Rule discharged.

Solicitors for relators: *Renshaw, Kekewich, & Smith.*

Solicitors for defendants: *Walton, Johnson, Bubb, & Walton.*

P. B. H.

1895
April 10.

BAYNES & CO. *v.* LLOYD & SONS.

Landlord and Tenant—Sub-lease—Implied Covenant for Title—Implied Covenant for Quiet Enjoyment—Duration of Covenant.

The defendants being possessed of a term of years in a house, of which term there were eight and a half years then unexpired, by indenture sub-let the premises to the plaintiffs for a term of ten and a half years, acting under a mistake, but in good faith. The sub-lease did not contain any express covenants either for title or for quiet enjoyment, nor did the words of letting include the word "demise." The plaintiffs entered and occupied the premises until the expiry of the eight and a half years, when they were evicted by the defendants' superior landlord. The plaintiffs having brought an action for damages for breach of implied covenants for title and for quiet enjoyment:—

Held, that in the absence of the word "demise" the law would not imply a covenant for title as distinguished from a covenant for quiet enjoyment; and that, although the law would imply a covenant for quiet enjoyment, such implied covenant would not enure beyond the termination of the defendants' own estate, and that consequently the plaintiffs could not recover.

ACTION tried before Lord Russell of Killowen C.J. without a jury.

English Harrison, and *Leck*, for the plaintiffs.
Gully, Q.C., and *H. Sutton*, for the defendants.

LORD RUSSELL of KILLOWEN C.J. In this case the plaintiffs sued the defendants for damages for breach of an alleged covenant for title, and in the alternative for breach of a covenant for quiet enjoyment said to be implied in a lease under seal of March 31, 1885, whereby the defendants let to the plaintiffs the basement of 21, Bush Lane, for a term of ten and a half years, less one day, reckoning from March 25, 1885, at a net yearly rental of 40*l.* payable quarterly.

The defendants' superior landlord commenced an action against the plaintiffs, and recovered possession with costs, whereby the plaintiffs lost the benefit of about two years of the term of ten and a half years, suffered damage, and were put to expense for which they sued.

The substantial defences were that there were no such implied covenants or covenants in law, and further that, if there were

any such implied covenants or covenants in law, they enured only during the continuance of the defendants' (the lessors') estate. The lease in question was, so far as material, in the following terms:—

"(1.) The landlords agree to let and the tenants agree to take part of the basement of No. 21, Bush Lane, from the north end thereof to the fire-proof room and partition now already erected across the said basement together with the free right of access thereto by the door and passage now used therewith for the term of ten and a half years less one day from the 25th day of March, 1885, and at a net yearly rental of 40*l.* payable by equal quarterly payments on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in each year, the first payment to be made on the 24th day of June next, and the last payment to be made in advance one calendar month before the expiration of the term.

"(2.) The tenants to pay the said rent on the days and in the manner aforesaid and to pay the gas rate and 1*l.* a year in lieu of water-rate and to keep the inside of the premises (including fixtures) in good and sufficient repair and condition and properly painted and coloured during the term in conformity with the terms of the lease under which the said premises are held by the landlords."

It will thus be seen that the lease contains no express covenants on the points here in question. The draft of the lease was prepared by the defendants' solicitor in the ordinary course, and sent to the plaintiffs' solicitor for approval on March 7, 1885, and was executed on the date, March 31, 1885, which it bears. As a matter of fact, the premises demised were and ought to have been described as No. 22, Bush Lane. There was, however, no mistake as to the identity of the parcels, and both parties agreed to treat the insertion of the wrong No. 21 as a mere clerical error for No. 22. It is important, however, to note that while the defendants' estate in the premises No. 22, which were in fact intended to be demised, and were in fact occupied by the plaintiffs, expired on September 29, 1893 (that is to say, about two years before the expiration of the term in the sub-lease to the plaintiffs), the defendants had, in respect of the

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premises No. 21, Bush Lane, an estate sufficient to enable them to grant the term of ten and a half years. I call attention to this in order to make it clear that there was in fact a bonâ fide mistake, and that there was no intention on the part of the defendants to mislead the plaintiffs or to misrepresent the facts. In other words, this case must be dealt with upon the assumption that there was on the part of the defendants no fraud or wilful misrepresentation, but, on the contrary, that they executed the lease in good faith.

The question which then arises is, Is there any implied covenant, or, more correctly, any covenant in law either for title or quiet enjoyment? And, if there be one or the other, does it enure beyond the continuance of such estate as the defendants, the lessors, in fact had?

It was contended for the plaintiffs that *Stranks* v. *St. John* (1) was an authority in support of their contention. In my opinion it is not. The head-note does not, I think, accurately convey what was in fact decided in that case. There it appeared that the defendant purported to grant a lease for seven years by writing, not under seal, as required by the statute 8 & 9 Vict. c. 106, and the first question was, whether the instrument, being void as a lease, could nevertheless be held to be operative as an executory agreement to grant a lease under the 4th section of the Statute of Frauds. The Court, following the authorities, held that it might be so regarded as an agreement to grant a lease. The question arose on demurrer to the declaration, and the facts stated in the declaration were therefore admitted to be true. It was there alleged that the defendant never—not merely at the time of the agreement, but never—had any right or title to let the premises to the plaintiff. The Court having decided the first point, that the instrument was good as an executory agreement to let—that is, to grant a lease—the next point was whether a person who admitted that he never had any right to make such an agreement was not liable for damages for breach of contract. The Court held (and it is difficult to see how it could have held otherwise) that he was so liable. But has that case any bearing on this? I think it has not. That was an executory agreement

(1) Law Rep. 2 C. P. 376.

to lease. This is an indenture under seal—a lease executed with all due legal formalities. Had the instrument in *Stranks' Case* (1) been sealed it would also have been perfectly valid as a lease; but in that case the authorities there cited would not have been relevant. The question then would have been, as it is here, What remedy, if any, has the plaintiff under the lease under seal as formally executed? And any preliminary contract to grant the lease would have no relevance to that question for the plain reason that the parties are bound (except in circumstances of fraud or misrepresentation) by the final instrument validly executed. It is clear that under such an agreement as in *Stranks' Case* (1) the intending lessee was entitled before he accepted a lease tendered under the agreement to be satisfied that the intending lessor had a good title to grant it, and for the purpose he had a right (if he chose to insist upon it) to require full disclosure. As was said by Lord Mansfield in *Keech* v. *Hall* (2), "Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds." But it is an entirely different question what is the legal effect of a lease when perfected: *Gosling* v. *Woolf* (3); see also *Clayton* v. *Leech* (4); *Bandy* v. *Cartwright* (5); *Hall* v. *City of London Brewery Co.* (6)

There being, then, in this case no express covenant in the lease, the next question is whether the law will annex any and what covenant or covenants. As I have pointed out, the plaintiffs allege an implied covenant or covenant in law for title, and, alternatively, for quiet enjoyment. The term "implied covenant" is often used in a two-fold sense: first, as denoting a covenant which is to be gathered from the four corners of the instrument, or from words or phrases not generally used in law to express a covenant, and in this sense an implied covenant is for all legal purposes the same as an express covenant; but, secondly, it is also used to denote a covenant in law—that is, a covenant attached by the law—apart from any expressed intention of the parties—by reason of the use of some particular words, for

(1) Law Rep. 2 C. P. 376.
(2) 1 Doug. 21.
(3) [1893] 1 Q. B. 39.
(4) 41 Ch. D. 103.
(5) 8 Ex. 913.
(6) 2 B. & S. 737.

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example, "demise"; or by reason of a particular relation, for example, that of landlord and tenant. It is with a covenant in this latter sense that we have to do in this case. Before considering whether the law does in the present case annex either a covenant for title or quiet enjoyment, it is necessary to consider the difference between the two covenants. In ordinary purchase-deeds there are usually five covenants, which may all be properly described as covenants for title, namely, that the vendor is seised in fee, that he has a good right to convey, for quiet enjoyment, that the property is free from incumbrances, and for further assurance. In the assignment of a leasehold there are also certain covenants for title: that the lease is valid, that the assignor has a good right to assign, for quiet enjoyment, that the property is free from incumbrances, and for further assurance. Now all these covenants are equally covenants for title; but a covenant for title sensu stricto as contrasted with a covenant for quiet enjoyment signifies the right to convey or assign or grant the lease, as the case may be. The distinction between the two is clearly pointed out by Lord Ellenborough in *Howell* v. *Richards*. (1) A covenant for title sensu stricto is broken if at any time, either ab initio or subsequently, the covenantor's title is invalid, and such covenant covers, therefore, much more than a prudent lessor would often be willing to give, and more than would be necessary for the protection of the lessee. A man may know that there is some defect, formal or otherwise, in his title, which he might for that reason be unable to force upon an unwilling purchaser, but which he is satisfied is a perfectly good holding title, and which would enable him to grant a lease with perfect security that his lessee would not be disturbed, and that is all that a lessee really requires, for a lease is nothing more than a contract to deliver up possession to another for a fixed term, and provided this is secured the lessee seldom requires more. Hence it is that, except in certain cases, e.g. building leases for long terms, the only usual covenant for title in leases is that for quiet enjoyment, and that generally a qualified covenant only. Will, then, the law annex to the lease in question a covenant for title sensu stricto? Are

(1) 11 East, 633, at pp. 642, 643.

there any words or phrases in it having that effect? I think not. No doubt the law has long attached a special signification to certain words. Thus, the word "demise" (which does not occur in the lease in question) imports a covenant for title and a covenant for quiet enjoyment: *Line* v. *Stephenson* (1); and this has been the law from early times, as explained by Tindal C.J. in *Williams* v. *Burrell* (2); it also attached peculiar significance to other words—for example, to the word "give" in a feoffment (Co. Litt. 384a, Hargrave and Butler's Notes), also to the words "exchange" and "grant" (ibid.). At this day, however, except in the case of the word "demise," no special meaning any longer attaches to these words, the statute law having abrogated their effect. In this connection I wish to say, with great deference, that although I agree in the decision of *Mostyn* v. *West Mostyn Coal and Iron Co.* (3), I venture to doubt the correctness of the view which would appear to have been there suggested (at p. 152), that any words equivalent to "demise" would import a covenant for title sensu stricto, however they might import a covenant for quiet enjoyment; nor do I think that the case of *Hart* v. *Windsor* (4), if carefully examined, will be found to support that view. There being, then, no language in the present lease by reason of which any covenant for title is, in my judgment, annexed by law, it only remains to consider whether such a covenant for title is to be considered annexed by reason of the relation of lessor and lessee, or landlord and tenant. I think not: see *Bandy* v. *Cartwright* (5), decided in 1853, and since followed in 1863 in *Hall* v. *City of London Brewery Co.* (6) These were, no doubt, cases of parol demise; but that fact seems to me unimportant when considering whether the obligation is by law attached by reason of the relation of landlord and tenant—of lessor and lessee. If it attaches by reason merely of that relation, it cannot matter whether that relation is created by parol or otherwise.

The next question is whether there is in this case any covenant in law for quiet enjoyment. In my opinion, the law does

(1) 5 Bing. N. C. 183.
(2) 1 C. B. 402.
(3) 1 C. P. D. 145.
(4) 12 M. & W. 68, at p. 85.
(5) 8 Ex. 913.
(6) 2 B. & S. 737.

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import this covenant in all cases where the relation of landlord and tenant is established by instrument under seal, and imports a contract to the same effect where the instrument is not under seal. In support of this view I again refer to the cases of *Bandy* v. *Cartwright* (1) and *Hall* v. *City of London Brewery Co.* (2) (amongst others), and I think, as stated by Cockburn C.J. in the latter case (at p. 741), that the law is founded in good sense, and that a covenant for quiet enjoyment is imported ex vi termini. If the matter rested here the plaintiffs would be entitled to judgment; but it does not rest here. The question remains, assuming such a covenant in law for quiet enjoyment to be imported into the lease, what is its duration? I have come to the conclusion, after careful consideration of the authorities, that such implied covenant or covenant in law determines with the interest of the lessor, or, in other words, enures only during the continuance of that interest. This was expressly decided sixty years ago in *Adams* v. *Gibney* (3), where all the authorities are collected, and the rule is there stated to have prevailed since the time of Queen Elizabeth. The same point was again expressly decided in 1862 in *Penfold* v. *Abbott* (4): see also the arguments in the case of *Williams* v. *Burrell.* (5)

For these reasons the plaintiffs must, I think, fail. The rule is too firmly and too long established to be now questioned. Nor can I regard this case as of one of special hardship. The plaintiffs had, in the draft lease sent to them for approval and in the lease itself, express notice that the defendants were themselves lessees only; but they failed to inquire into the terms of their lessors' lease, although they were at the same time covenanting in the sub-lease in question to discharge some of its obligations. The Courts, in my humble opinion, have too often sought, in order to avoid hardship, to import by implication protective provisions not to be found expressed in written contracts. It is not desirable to make further effort in this direction. I think it much better that contracting parties should be made clearly to understand that their duty is to put into the contracts

(1) 8 Ex. 913.
(2) 2 B. & S. 737.
(3) 6 Bing. 656.
(4) 32 L. J. (Q.B.) 67.
(5) 1 C. B. 402.

into which they enter such express provisions as may be needed for their protection.

I therefore give jud gment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Fishers.*

J. F. C.

WIRRAL HIGHWAY BOARD *v.* NEWELL.

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Jan. 15; *March* 5.

Highway—Repair—Extraordinary Expenses—Certificate of Surveyor—Inclusion of more than one Highway in Certificate—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

A certificate of the surveyor to a highway board, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as to extraordinary expenses incurred upon highways in their district, is not bad by reason of the fact that it includes more than one highway, and does not particularize or describe the highways included; a separate certificate need not be given in respect of each highway.

CASE stated by justices of Cheshire under 42 & 43 Vict. c. 49.

A complaint had been preferred by the appellants, the Wirral Highway Board, against the respondent, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), charging that it appeared by a certificate of the surveyor to the board, dated May 31, 1894, that the board having regard to the average expense of repairing highways in the neighbourhood, had incurred extraordinary expenses up to the date of the certificate to the amount of 202*l.* 3*s.* 2*d.* in repairing a highway in the township of Burton to the boundary of the local board district of Neston and Parkgate, by reason of damage done to the highway which was caused by excessive weight passing along it and extraordinary traffic thereon, and that such weight and traffic had been conducted by the order of the respondent.

The facts were shortly as follows.

The respondent was a railway contractor, and between April,

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1893, and April, 1894, extraordinary traffic had taken place upon the road in question by his order, and extraordinary expenses were incurred by the appellants in the repair of the road by reason of such excessive traffic. Similar extraordinary expenses were likewise incurred by the appellants in respect of other highways within their jurisdiction; and on December 7, 1893, their surveyor gave a certificate that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses to the amount of 285*l.* 6*s.* 11*d.* had been incurred by the appellants in repairing highways in the townships of Barnston, Storeton, Burton, and Ness during the preceding twelve months by reason of the damage done to the said highways by extraordinary traffic caused by the order of the respondent. The highways mentioned in this certificate included the highway referred to in the complaint and in the subsequent certificate of May 31, 1894.

On December 14, 1893, the appellants demanded payment of the above sum of 285*l.* 6*s.* 11*d.*; but the respondent did not pay the same or any part thereof.

On January 11, 1894, the appellants wrote to the respondent, that in order to prevent two claims being made against him with reference to the extraordinary traffic they thought it better for the surveyor to put the roads into a complete state of repair, that this would be done forthwith, and that they would then send him a copy of the surveyor's certificate with reference to the cost entailed upon them for the extraordinary traffic for each road separately. The respondent in reply declined to express any opinion.

By May 31, 1894, the respondent's extraordinary traffic had ceased, and all extraordinary expenses had been incurred by the appellants in repairing the highway in question, and on that day the appellants' surveyor signed the certificate referred to in the complaint, and in which the extraordinary expenses incurred between April, 1893, and April, 1894, in repairing the highway in question were certified to be 202*l.* 3*s.* 2*d.* This sum included the expenses alleged to have been incurred in respect of this highway between April 30 and December 7, 1893, the date of the first certificate.

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On the hearing of the complaint, which was made on July 5, 1894, the respondent objected to the receipt of evidence as to whether any extraordinary expenses had been incurred prior to December 7, 1893, on the ground that so much of the matter of complaint as was in respect of such expenses did not arise within six calendar months preceding the date of the making of the complaint, and that such matter of complaint arose upon December 7, 1893, the date of the certificate, or upon December 14, 1893, the date of the demand for payment, and that therefore the complaint of July 5, 1894, was not made within the period of time prescribed by 11 & 12 Vict. c. 43, s. 11. The justices determined the point in favour of the respondent, and took evidence only as to extraordinary expenses incurred subsequent to December 7, 1893; they found as a fact that since that date extraordinary expenses to the amount of 52*l.* had been incurred, and made an order for payment of that amount.

The question of law for the opinion of the Court was whether the justices were justified in law upon the above facts in excluding on the hearing of the complaint evidence of the extraordinary expenses alleged to have been incurred by the appellants prior to December 7, 1893. (1)

Bosanquet, Q.C., for the appellants. The evidence was improperly excluded. The expression "extraordinary expenses" means expenses which are extraordinary with reference to the particular road in question, and not with reference to other roads

(1) By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

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in the district: *Whitebread* v. *Sevenoaks Highway Board* (1); *Etherley Grange Coal Co.* v. *Auckland District Highway Board.* (2) The surveyor should therefore certify as to extraordinary traffic on the particular road, and not as to extraordinary traffic generally in the district, and the first certificate was bad because no road at all was mentioned, and it was a mere certificate as to extraordinary traffic and extraordinary expenses in the district generally. The case is analogous to that of a surveyor who apportions the expenses of making up a street, as to which it was held in *Cook* v. *Ipswich Local Board* (3) that an apportionment in which the expenses of two streets were lumped together was bad, and that the time for preferring a complaint ran from a subsequent apportionment dealing with the expenses in each street separately. [He also cited *Hill* v. *Thomas.* (4)]

Tobin, for the respondent. The six months' limitation dates from the surveyor's certificate: *Pool and Forden Highway Board* v. *Gunning* (5), and the sole question is, therefore, whether the certificate of December 7, 1893, was a good certificate. It was a good certificate. The object of the certificate is merely to satisfy the board that extraordinary expenses have been incurred within their district; the certificate is not itself evidence in the proceedings before justices, and the board can only recover the expenses proved to the satisfaction of the Court to have been incurred. It is found as a fact by the justices that the road in question was included in the roads referred to in the certificate of December 7, and one certificate may include several highways: *Wallington* v. *Hoskins* (6), where, however, the point as to the validity of the certificate was not taken.

[KENNEDY J. In that case the highways were particularly described.]

The highway need not be identified in the certificate, provided that it is within the district; whether a particular highway is within the district and has been damaged and repaired is a matter of proof, and it may be that it should be mentioned in the summons, though not in the certificate. By s. 1 of the

(1) [1892] 1 Q. B. 8.
(2) [1894] 1 Q. B. 37.
(3) Law Rep. 6 Q. B. 451.
(4) [1893] 2 Q. B. 333.
(5) 51 L. J. (M.C.) 49.
(6) 6 Q. B. D. 206.

Interpretation Act, 1889, words in the singular include the plural, and the word "highway" in s. 23 of the Act of 1878 is therefore to be read as including highways. [He also cited *Story* v. *Sheard* (1); *Pickering Lythe East Highway Board* v. *Barry*. (2)]

Bosanquet, Q.C., in reply.

Cur. adv. vult.

March 5. The judgment of the Court (Lawrance and Kennedy JJ.) was read by

LAWRANCE J. (After stating the facts the learned judge proceeded): The question raised for our determination is whether the justices were right in limiting the amount recoverable by the appellants to the expenses incurred after December 7, 1893, or whether they ought to have included the extraordinary expenses incurred from April, 1893. We are of opinion that the justices arrived at a proper conclusion, and that our judgment should be for the respondent. It is argued on behalf of the appellants that the certificate of December 7, 1893, was invalid, as it related to several other highways as well as to the highway in question, and it was suggested that such a certificate was a nullity and might be rectified by the issue of a second certificate. In favour of this view, the case of *Cook* v. *Ipswich Local Board* (3) was cited; but it appears to us that the cases are essentially different. In that case, the surveyor whose duty it was to make an apportionment of the sum to be paid by the owner of certain property having made a bad apportionment by lumping together expenses in regard to two streets which ought to have been kept separate, the Court held such apportionment was a nullity and that the surveyor was not precluded from making a proper apportionment. In the present case the alleged invalidity of the certificate was caused by the fact that more highways than one were included in the certificate; but it seems to us that the object of the certificate is to inform the highway board of the fact that extraordinary expenses have been incurred upon certain highways within their jurisdiction, and upon that certificate the

(1) [1892] 2 Q. B. 515. (2) 8 Q. B. D. 59.
(3) Law Rep. 6 Q. B. 451.

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complaint preferred before the justices is formulated, and the apportionment or estimate of expenses seems to form no necessary part of the certificate, but is the subject of proof before the Court having cognizance of the case: 41 & 42 Vict. c. 77, s. 23.

It seems to us, therefore, that the December certificate was sufficient for the purpose of founding proceedings for the recovery of the expenses, and as in July, 1894, the proceedings had not commenced within six months of the giving of the certificate (*Pool and Forden Highway Board* v. *Gunning* (1)), the time had passed during which any claim could be made upon the respondent in respect of extraordinary expenses incurred before December, 1893. Under the circumstances we think the justices were right in excluding those extraordinary expenses from the amount ordered by them to be paid by the respondent.

Judgment for the respondent.

Solicitors for appellants: *Cunliffes & Davenport, for W. H. Churton, Chester.*

Solicitors for respondent: *Field, Roscoe & Co., for Yates, Johnson, & Leach, Liverpool.*

(1) 51 L. J. (M.C.) 49.

W. J. B.

ATTENBOROUGH *v.* HENSCHEL. 1895

Feb. 13.

County Court—Practice—Stay of Execution—Sufficient Cause—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 153.

By s. 153 of the County Courts Act, 1888, the judge has power to stay execution where it appears to him that the defendant is unable "from sickness or other sufficient cause" to pay and discharge the debt or damages recovered against him:—

Held, that mere inability of a defendant to pay owing to want of means was not a sufficient cause within the meaning of the section, and that there was no jurisdiction to stay execution on the ground of such inability.

APPEAL from an order of the judge of the Westminster County Court staying execution upon a judgment.

The action was brought to recover 50*l.* damages for breach of a covenant to repair; the defendant did not appear at the trial, and judgment was given for the plaintiff for 50*l.* The defendant subsequently made an application that the judgment debt should be paid by instalments, and offered to pay 4*l.* a month, and evidence was then gone into as to the defendant's means. The learned judge was of opinion that under s. 105 of the County Courts Act, 1888, he had no power to order payment by instalments, the amount of the judgment debt being over 20*l.*, but was of opinion that, as the defendant had not means to pay the judgment debt immediately, he had power under s. 153 to stay execution; he therefore stayed execution for two months, with liberty for the plaintiff to apply to take off the stay, the officers of the Court to receive any moneys paid in by the defendant. The plaintiff appealed. (1)

(1) By s. 105 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), "Where judgment has been obtained for a sum not exceeding 20*l.*, exclusive of costs, the Court may order such sum and the costs to be paid at such time or times, and by such instalments, if any, as it shall think fit, and all such moneys shall be paid into court; but in all other cases the full amount for which judgment has been obtained shall be ordered to be paid either forthwith or within fourteen clear days from the date of the judgment, unless the plaintiff, or his counsel, solicitor, or agent, will consent that the same shall be paid by instalments, in which case the Court shall order the same to be paid at such time or times, and by such instalments, if any, as shall be consented to; and all such moneys, whether payable in one sum or by instalments, shall be paid into court."

By s. 153, "If it shall at any time

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C. L. Attenborough, for the plaintiff. The order was made without jurisdiction. Primâ facie, in the case of a judgment for more than 20*l.*, payment is, by s. 105, to be ordered to be made forthwith or within fourteen days; an exception is made by s. 153 in favour of defendants who "from sickness or other sufficient cause" are unable to pay. The "other sufficient cause" must be some physical cause, if not ejusdem generis with that of sickness; at any rate, mere inability to pay from want of means is an insufficient ground for a stay of execution. The order not only prevents the plaintiff from levying execution, but also practically prevents him from taking bankruptcy proceedings, which he could not take if, by payment into Court under the order, the defendant reduced the amount of the judgment, that is the debt and costs, below 50*l.* The order in effect compels the plaintiff to accept payment by instalments.

W. M. Thompson, for the defendant. Under s. 153 the judge has an absolute discretion to stay execution, the sole limitation being that he must be convinced that from some reasonable cause the defendant is unable to pay; want of means to pay is such a reasonable cause as is contemplated by the section.

WILLS J. I regret to be obliged to come to the conclusion that this order cannot be supported. No doubt a very wide discretion as to suspending or staying execution is given to the judge by s. 153; but it was never intended that the defendant's inability to pay should be sufficient cause to prevent a plaintiff from enforcing his judgment. The words "sufficient cause" must receive some limitation from the context, and in the latter part of the section we find them coupled with sickness and insanity. The cause must be something which would account

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appear to the satisfaction of the judge that the defendant in any action or matter is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action or matter, for such time and on such terms as the judge shall think fit, and so from time to time until it shall appear that such cause of inability has ceased. . . ."

for the inability to pay—some external cause operating to prevent the defendant from exercising his industry; I do not attempt to define the word exhaustively, but it must be something beyond mere inability to pay. I am drawn to this conclusion by a consideration of the language of the last clause of the section, which makes it to my mind clear that mere impecuniosity is insufficient. It is clear that the power given by s. 105 to order payment by instalments is confined to cases where the sum recovered does not exceed 20*l.*, and that where more than that sum is recovered the power was designedly excluded, it being supposed that a man who incurred a debt above that amount would be in a more substantial position; but this order in effect allows the defendant to pay by instalments of 4*l.* a month, and is bad.

WRIGHT J. I agree. I do not desire to lay down any limits within which the discretion of the judge must be exercised, but it is plain to me that it must be exercised on something more than evidence of mere insufficiency of means.

Appeal allowed.

Solicitors for plaintiff: *Stanley Attenborough & Tyer.*
Solicitor for defendant: *J. S. Merton.*

W. J. B.

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Feb. 9.

RODDICK *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY, LIMITED.

Insurance (Marine)—"Hull and Machinery"—"Warranted Uninsured"—"Honour" Policies—"Disbursements"—Infringement of Warranty.

The plaintiff effected a time policy with the defendants on the hull and machinery of a steamship which was valued at 10,000*l*. The policy contained the proviso "5000*l*. warranted uninsured." The total policies effected by the plaintiff on hull and machinery amounted to 5000*l*. He had, however, further effected, by means of "honour" policies, insurances on "disbursements" to the extent of 2600*l*., and, the ship having been lost within the insured period, the defendants refused payment on the ground that these policies infringed the warranty:—

Held, that the "honour" policies, although void at law under 19 Geo. 2, c. 37, were effective to infringe such a warranty, but that since the policies were on "disbursements" they did not cover any part of the subject-matter insured by the policy on "hull and machinery," and therefore did not infringe the warranty.

ACTION tried by Kennedy J.

The plaintiff claimed under a policy of insurance dated January 8, 1894, declared to be upon the hull and machinery of the steamship *Oxenholme*, which were valued at 10,000*l*., "warranted free from particular average absolutely, 5000*l*. warranted uninsured except for running down clause" for six months from January 9, 1894, to July 8, 1894. "Warranted trading between River Plate (not above but including Buenos Ayres) and Rio de Janeiro, Bahia, Santos $\frac{\text{and}}{\text{or}}$ Pernambuco, and including risk out and home from the Mersey with leave to call as required especially any ports $\frac{\text{and}}{\text{or}}$ places in the Bristol Channel."

The facts proved and the arguments used at the trial are fully set out in the judgment.

Bigham, Q.C., and *J. G. Horridge*, for the plaintiff.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants.

Cur. adv. vult.

Feb. 9. KENNEDY J. read the following judgment:—In this action, which was tried before me (the jury being discharged by

consent during the progress of the case) at the recent Liverpool Assizes, the plaintiff sues the defendants upon a policy of marine insurance for 1000*l.* upon the hull and machinery of the steamship *Oxenholme*, dated January 8, 1894. The policy is a time policy for six months from January 9, 1894, to July 8, 1894. The *Oxenholme* was lost between these dates; but the defendants dispute their liability to the assured upon the ground that one of the warranties in the policy was not complied with.

The facts, so far as they were alleged by either side to be material, may be briefly stated as follows: The policy is a policy on hull and machinery valued at 10,000*l.* The plaintiff, who had been the owner, was at the date of the policy the mortgagee of the *Oxenholme*; but it is unnecessary to refer in detail to the nature of his interest because no question of excess was raised by the defendants as to the amount of the valuation. The important part of the policy is the warranty upon which the defence is rested, and that warranty is this: "5000*l.* warranted uninsured except for running down clause." The plaintiff effected policies, including this policy, expressly on hull and machinery to the extent of 5000*l.* and no more. So far, therefore, as regards policies expressed to be upon hull and machinery he complied with the warranty. But he did effect certain insurances upon "disbursements" to the extent altogether of 2600*l.*, and the contention of the defendants is that by so doing he broke the warranty. All these "disbursement" policies were P. P. I. or "honour" policies—policies, that is to say, wherein it was stipulated that the policy should be deemed sufficient proof of interest. They were, therefore, null and void in law under the provisions of 19 Geo. 2, c. 37. It was not suggested that in effecting these policies the plaintiff sought to evade the effect of the warranty which he had given to the defendants, or to act dishonestly in any way. According to his answer (which was put in evidence) to the defendants' interrogatories, he intended in effecting these honour policies for 2600*l.* to cover certain disbursements, amounting to about 2583*l.* for coals, stores, and expenses which he had made in respect of the ship in view of her proceeding from the United Kingdom to the coast of South America, and afterwards trading there as warranted by him in

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his "hull and machinery" policies. The figures of these disbursements were as follows:—

About 1487*l.* expended on coal.
„ 318*l.* engine-room and deck-stores.
„ 462*l.* provisions and cabin stores.
„ 191*l.* port expenses at Newport and advances.
„ 395*l.* premiums.

It was elicited from the plaintiff and the master of the *Oxenholme* in cross-examination that within the six months the whole of the coals would probably have been used, and a large portion at least of the stores; and, although some of the provisions might remain, this would be because fresh provisions would in ordinary course be taken on board from time to time at the ports at which the vessel would call in the course of trading along the coast.

In fact, before the *Oxenholme* was lost on June 4, 1894, 750 tons of the coals had been sold to make room for cargo at a South American port. The master of the *Oxenholme* also deposed that on the voyage outwards from the United Kingdom to South America, lasting about twenty-seven days, the steamer would use up about twenty-five tons of coal every day, and also, of course, a portion of her stores and provisions.

These are the only facts, I think, appearing on the evidence to which, in view of the contentions of the parties, I need refer. The very little that I have to say in regard to certain evidence given by two witnesses called as experts in insurance I will say later on.

It is plain that if by these "disbursement" policies the plaintiff was insured within the meaning of the warranty in question, and if also these "disbursement" policies covered any part of that which was included in the subject of the policies on "hull and machinery," the warranty was not complied with, and the defendants were entitled to succeed in their defence; but that they must fail unless both these propositions could be established. The plaintiff's counsel contended that neither of them was tenable. They argued that the "honour policy" being null and void by statute was no insurance at all, and therefore that, in spite of these "disbursement" policies having been effected

by him, the plaintiff was uninsured within the meaning of the warranty even if their subject-matter was in part the same subject-matter as that of the policies on "hull and machinery." They argued further, that the insurance on "disbursements" could not be treated as an insurance on "hull and machinery," or, to put the same contention in other words, that the insurance on "disbursements" did not cover any part of that which was included in the insurance on "hull and machinery."

As to the first of these two branches of the argument, I am of opinion that the plaintiff is wrong, and that the "honour" policies on "disbursements" cannot be disregarded in reference to this warranty on account of their legal invalidity. A curious result would follow if they could be. The main, if not the whole, object of the warranty is to give the insurer a pledge of the good faith of the assured and of his diligence in preserving the thing assured by reason of his remaining his own insurer to the extent specified in the warranty. It was admitted in the course of the argument, and it could not but be admitted, that a claim under an "honour" policy is regularly recognised and discharged by the underwriter as faithfully and as promptly as a claim under a policy which is not open to the same legal objection. Therefore, if this contention on behalf of the plaintiff is right, he might, after giving this warranty, have straightway gone and safely defeated its purpose by covering by "honour" policies on "hull and machinery" the whole of the 5000*l.* which he warranted uninsured. Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word "uninsured" in a commercial document of this kind, as it must be taken to have been understood both by assurer and assured by the light of their common knowledge of the universal treatment of an "honour" policy in the insurance world, I am of opinion that the clause ought to be construed as a warranty by the plaintiff that as to 5000*l.* he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance. It is merely another way of putting the same thing to say that we ought not to read into the warranty the words "by any policy not invalid in point of law."

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I have looked into the two cases—one English and one American—to which I was referred in support of the plaintiff's contention upon this issue; and, in my judgment, both are distinguishable from the present case.

The English case is *Parry* v. *Great Ship Co., Limited.* (1) The question there (stated shortly) was whether or not a condition in an agreement between attorneys for a stay of proceedings, that certain mortgage moneys should be "kept insured," was fulfilled when for some days there was no policy of insurance, but only the undertaking to issue a policy which is contained in the slip. The Court held that it was not. There may be other grounds of distinction between that case and this; I hold it to be a sufficient distinction that the Court was not then construing a policy of insurance or a mercantile instrument at all. Blackburn J. pointed out in the course of the argument: "This is an agreement between two attorneys, which is not to be construed as merchants would construe it"; and in his judgment Mellor J. observed: "Mr. Lush says that this contract is to be construed according to mercantile usage. But it is not a mercantile instrument; it is an agreement made between the attorneys for the plaintiff and the defendants."

The American decision is *Stacey* v. *Franklin Fire Insurance Co.* (2), decided in the year 1841. There is an earlier decision to the same effect: *Jackson* v. *Massachusetts Mutual Fire Insurance Co.* (3), decided in the year 1839. The result of these cases is stated in Phillips' work, 5th ed. vol. i. s. 864, in these terms: "A provision in a policy that if notice of other insurance by the assured on the same subject is not given the policy shall be void, applies to other, subsequent as well as prior, insurance; but if the subsequent other insurance is void by reason of not giving notice of the prior insurance, the latter will remain valid." These American decisions, even if in point, are not binding upon me; but I do not think that they are in point. In neither case was the subsequent insurance that which an "honour" policy undoubtedly is—an instrument practically available to the assured. On the contrary, it will be seen on reference to the

(1) 4 B. & S. 556.

(2) 2 Watts & S. (Pa.) Rep. 506.

(3) 23 Pick. (Mass.) 418.

reports, that in each case in slightly different terms it was stipulated upon the face of the subsequent policy that in the absence of the consent of the insurer to a prior policy the subsequent policy should be for all purposes null and void.

Whilst, however, I have come to a conclusion adverse to the plaintiff upon this branch of the case, I am of opinion that upon the second branch of the case the plaintiff is right, and is therefore entitled to succeed in this action.

He warranted himself uninsured to the extent of 5000*l.* on "hull and machinery." Was he insured on "hull and machinery" by the policies on "disbursements"? Primâ facie, looking at the words alone, one would certainly say that he was not, and that "hull and machinery" and "disbursements" are distinct and separate subjects of insurance. But I quite agree that one must not decide merely according to the ordinary and non-commercial meaning of the words, but that one must look at the truth and substance of things as matters of insurance business. The contention of the defendants, if I properly understand the argument of their counsel, is this: "Hull and machinery" included some part at least of the equipment or outfit of the *Oxenholme*, i.e. the coals, the engine-room and other stores, and the provisions, which were also covered and were intended by the plaintiff to be covered by the "disbursement" policies. No doubt, if this is so, if the subject of the "hull and machinery" policies to the smallest extent includes what is also covered by the "disbursement" policies, the warranty has not been complied with. It is urged by the defendants that, at least to the extent of so much of the coals, &c., as was provided, and as was requisite as outfit or equipment for the voyage outwards from the United Kingdom to South America, this was the case. I am unable to accept the defendants' view upon this point. The burden of proof here, where the words, read in their natural meaning, make against the contention, lies certainly on them.

I have referred to the Reports and to the works of recognised modern writers on Marine Insurance, and I can find no authority for the proposition that even in a voyage policy the insurance on "hull" or "hull and machinery" covers any part of the coals, stores, or provisions. The very fact that the parties

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to this contract have chosen to describe the subject of the insurance as "hull and machinery" and not as "ship," which has long been held in a voyage policy, at all events, besides covering hull and (in the case of a steamer) machinery, to cover also outfit in stores and provisions, makes, as it appears to me, against the defendants. And if reference is made to the leading cases in which this extended meaning of "ship" was settled, the language used in the judgments points, I think, to the "hull" and the "outfit" as things to be treated as distinct subjects of insurance, and not included the one in the other.

Thus in *Brough* v. *Whitmore* (1), Buller J. says: "Now it is perfectly clear that in every instance where losses have been settled the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way: the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions. The value of the ship alone comprehends all these articles." And so Lord Ellenborough C.J. in *Forbes* v. *Aspinall* (2): "An insurance upon freight has no reference to the hull of the ship or to its outfit for the voyage, both of which are protected by insurance upon the "ship."

Even if this were a "voyage" policy, and not, as it is, a "time" policy, I should not see my way to the adoption of the extended meaning of "hull and machinery" which the defendants ask me to adopt. But in a time policy the adoption of it seems to me to be more unreasonable, for there is in a time policy no stipulated and definite voyage in respect of which there must be an outfit. And I do not think that the force of this consideration is practically affected in the present case by the fact, which I have not forgotten, that the policy contains a warranty as to the movements and trading of the vessel within certain wide limits during the six months covered by the policy.

I should not add anything further, but that the plaintiff called two witnesses—Mr. Vallance, underwriter for the Alliance Marine Insurance Company, and Mr. Jacob, of the firm of Jacob & Edward, insurance brokers in London—and the defendants' counsel rather relied upon a portion of their evidence. Certainly,

(1) 4 T. R. 206, at p. 210. (2) 13 East, 323, at p. 325.

in my judgment, this evidence did not help the plaintiff; I do not think it was material either way. In substance, as I understand it, it came to this. First, as to "disbursements," that they constituted, apart from "hull and machinery," a common subject of insurance, and were recognised by underwriters as a distinct and different subject from "hull and machinery"; that they covered all expenditure, made or to be made, in which the insured had an insurable interest, and might cover even the difference between the value at which a ship stood in the books of her owner and her reduced value through depreciation. Secondly, as to "hull," that an insurance on "hull," according to the well-known practice of underwriters, would in a voyage policy (and the evidence of the witnesses was expressly confined to a voyage policy) include such equipment or outfit (in the case of a steamship) in the shape of bunker coal and ordinary deck and engine-room stores as would be necessary for the voyage described in the policy.

It appears to me that the evidence as to "disbursements" adds nothing to what one would have been justified in assuming without it, and that the evidence as to the inclusion of outfit in the term "hull" in a voyage policy, if correct, according to my understanding of it—and upon the older authorities to which I have referred it seems curious that "hull" and "ship" should have come to be treated in this respect as equivalent—is not inferentially applicable to the present case of a policy which is not a voyage policy, but a time policy.

I give judgment for the plaintiff for the amount claimed with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Simpson, North, Harley, & Birkett, Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

A. P. P. K.

1895
April 25.

IN RE HOWELL. EX PARTE MANDLEBERG & CO.

Bankruptcy—Landlord and Tenant—Distress—"Rent accrued due prior to Date of Order of Adjudication"—Bankruptcy Act, 1883, *ss.* 9, 42, *Sched. II., r.* 19—*Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35).

Where a tenant becomes bankrupt during the currency of a quarter, so much of the quarter's rent as is apportionable to the part of the quarter prior to the date of the order of adjudication is by virtue of the Apportionment Act, 1870, "rent accrued due prior to the date of the order of adjudication" within the meaning of s. 42 of the Bankruptcy Act, 1883, and the landlord is entitled upon the expiry of the quarter to distrain upon the goods of the bankrupt for the same.

APPEAL from the county court of Yorkshire holden at Huddersfield.

In March, 1894, Messrs. Mandleberg & Co. let to Howell, the debtor, certain premises for a term of years at a rent of 200*l.* payable quarterly on the usual quarter-days. The debtor duly paid the first quarter's rent due on June 24. During the currency of the succeeding quarter on September 1, a receiving order was made against the debtor, and on September 15 he was adjudged bankrupt. On September 30 the landlords levied a distress upon the bankrupt's goods for the quarter's rent due on September 29. The trustee in bankruptcy having tendered to the landlords the sum of 16*l.* 13*s.* 4*d.*, being the amount of the apportioned rent for the period between September 1 and September 29, the registrar of the county court, upon the trustee's application, made an order restraining the landlords from proceeding with their distress in respect of the portion of the quarter's rent due for the period prior to September 1. From that order the landlords appealed.

Lawson Walton, Q.C., and *Muir Mackenzie*, for the appellants having stated the case, the Court called upon the other side.

H. Reed, Q.C., and *Carrington*, for the trustee. The appellants' only remedy is that of proof against the bankrupt's estate. By s. 9 (1) of the Bankruptcy Act, 1883, "except as directed by

(1) By s. 9 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), "On the making of a receiving order an official receiver shall be thereby con-

this Act no creditor . . . in respect of any debt provable in the bankruptcy shall have any remedy against the property . . . of the debtor in respect of the debt" without the leave of the Court. Then by rule 19 of Sched. II. of that Act, the part of the quarter's rent apportionable to the period before September 1 is a "debt provable." Therefore, unless there is a direction otherwise in the Act, the right of distress for this rent is taken away. The only section which deals with the subject is s. 42. But the right of distress there preserved is limited to distress for rent which has accrued due before the order of adjudication. And here the rent did not accrue due till September 29, which was subsequent to the order of adjudication. It must be conceded that the case of *Ex parte Hale, In re Binns* (1), which was decided under the Bankruptcy Act, 1869, is in the appellants' favour. But in that case the point now raised as to the effect of ss. 12, 35, which corresponded to s. 9 and Sched. II., r. 19, of the present Act, was not argued. Bacon C.J. proceeded apparently upon the ground that rent accruing due after the order of adjudication is altogether outside the limitation in s. 34 of the Act of 1869 (s. 42 of the present Act), a grammatical construction which the language of the section will not bear. The Apportionment Act, 1870 (2), cannot be relied on as shewing that the

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stituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property . . . of the debtor in respect of the debt . . . unless with the leave of the Court. . . ."

By s. 42 (1), "The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's [now six months] rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available."

By rule 19 of Sched. II., "When any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment grew due from day to day."

(1) 1 Ch. D. 285.

(2) By the Apportionment Act, 1870, s. 2, "From and after the passing

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IN RE HOWELL. EX PARTE MANDLEBERG & CO.

rent accrued due before the quarter-day, for that Act was intended only to deal with the rights of the respective parties entitled to the rents, and it was not intended to apportion the liability to pay them. There is nothing in the Act which suggests that the apportioned rent becomes due before it is payable. *Swansea Bank* v. *Thomas* (1) and *In re Wilson, Ex parte Lord Hastings* (2) were wrongly decided. But even assuming that the Apportionment Act does apportion liabilities as well as rights, that Act ought not to be read into s. 42 of the Bankruptcy Act, 1883, for that section is a mere repetition of s. 34 of the Act of 1869, which was earlier than the Apportionment Act, and the same meaning ought to be given to the language in the Act of 1883 as was originally given to it in the Act of 1869.

Muir Mackenzie, in reply. The trustee is in a dilemma. Either the Apportionment Act apportions liabilities as well as rights or it does not. If it does, then it is clear that the rent for which it is now sought to distrain accrued due before the date of the order of adjudication, and that consequently the right of distress is preserved by s. 42. If however it does not, and if consequently the rent for the quarter ending September 29 was an entire rent, then the trustee, being in possession at the quarter-day as assignee of the term, was liable by reason of his privity of estate for the whole quarter's rent, and any goods upon the premises, whether the property of the bankrupt or not, were liable to be distrained for the rent so due from the trustee. And the common law right of distress for such rent is not taken away by s. 9, for the operation of that section is confined to remedies for debts due from the debtor.

VAUGHAN WILLIAMS J. In this case the order appealed from went upon the assumption that the landlords had no right of

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of this Act all rents . . . and other periodical payments in the nature of income . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

By s. 3, "The apportioned part of any such rent . . . shall be payable or recoverable in the case of a continuing rent . . . when the entire portion of which such apportioned part shall form part shall become due and payable, and not before. . . ."

(1) 4 Ex. D. 94.

(2) 62 L. J. (Q.B.) 628.

distress except in respect of the period between the order of adjudication and September 29. In my judgment, that assumption was wrong. It was contended on behalf of the trustee that the landlords' right of distress in respect of the first two months of the quarter was taken away by the joint effect of s. 9 of the Act of 1883, rule 19 of Sched. II., and the limitation in s. 42. It was said that by rule 19 the portion of the rent applicable to those first two months was a debt provable in the bankruptcy, and that by s. 9 no creditor in respect of any debt provable is to have any remedy against the property of the bankrupt except as is directed by the Act. Then it was said that there was no direction in the Act that the landlords might distrain for such rent, for that s. 42, which to some extent preserves a right of distress, does so with the limitation that the distress must be in respect of rent accrued due prior to the date of the order of adjudication, and it was contended that this rent did not accrue due until September 29, when the quarter expired; and that, consequently, the landlords were left for their remedy to a right of proof. But I think that contention fails for this reason, that by virtue of the Apportionment Act, 1870, the rent in question accrued due prior to the order of adjudication. No doubt it was not payable until the end of the quarter, but it "accrued due" within the meaning of s. 42 from day to day. This was the view which I took in *In re Wilson, Ex parte Lord Hastings* (1), where I held, following the decision of the Exchequer Division in *Swansea Bank* v. *Thomas* (2), that the Apportionment Act was intended not merely to affect the rights of the recipients of the rent inter se, but also to apportion the liability to pay the rent between the different occupiers of the premises during the currency of the quarter.

But it was argued that that interpretation could not be put upon the words "accrued due" in s. 42, because that section was a mere re-enactment of s. 34 of the Bankruptcy Act of 1869, which was prior to the passing of the Apportionment Act, and that the words must have the same effect given to them in the Act of 1883 as was given to them at the time the Act of 1869 was passed. With that I cannot agree. The legislature must

(1) 62 L. J. (Q.B.) 628. (2) 4 Ex. D. 94.

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be taken to have re-enacted s. 34 with full knowledge of the provisions of the Apportionment Act which had been passed in the interval, and to have intended that the section so re-enacted should be applied to the altered condition of the law. The appeal must be allowed.

KENNEDY J. I am of the same opinion and for the same reasons. It seems to me that the language of s. 42 is perfectly clear, and that unless we are to disregard the plain meaning of the section, the order appealed from cannot be supported. I would add that it is practically impossible to distinguish the case of *Ex parte Hale, In re Binns* (1), and we could not, in my judgment, affirm the registrar in the present case without overruling that decision.

Appeal allowed.

Solicitors for appellants: *Rowcliffes, for Fox, Manchester.*
Solicitors for trustee: *Bannister & Reynolds.*

J. F. C.

C. A.

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April 2.

[IN THE COURT OF APPEAL.]

BLACK *v.* DAWSON.

Practice—Service out of Jurisdiction—Application to Set Aside Service—Order XII., *r.* 30—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An application by a defendant to discharge an order at chambers, made ex parte, giving leave to serve the writ upon him out of the jurisdiction, or to set aside the service, should be made by a summons at chambers, and not by motion in the Divisional Court or in the Court of Appeal.

MOTION to discharge an order made at chambers.

The plaintiff obtained an order ex parte from the judge at chambers giving leave to serve the writ out of the jurisdiction, and the defendant was served accordingly. The defendant thereupon served notice of motion before the Divisional Court under Order XII., r. 30 (2), to discharge the ex parte order made at chambers, and to set aside the service of the writ under it.

(1) 1 Ch. D. 285.

(2) Order XII., r. 30: "A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service."

The Divisional Court intimated that this was a matter of procedure within s. 1, sub-s. 4, of the Judicature Act, 1894, and that the motion should be brought on in the Court of Appeal.

The case was entered by the defendant in the list of motions in the Appeal Court.

1894. Dec. 20. *Crump, Q.C.*, and *Arthur Russell*, for the defendant.

Joseph Walton, Q.C., and *A. J. Walter*, for the plaintiff.

The question as to the practice in such cases having been raised, the Court directed that the case should stand over.

1895. April 2. LORD ESHER M.R. In this case an ex parte application was made to the judge at chambers for leave to serve the writ of summons out of the jurisdiction. That was a step in procedure, and if the judge had refused the application an appeal would have lain to this Court with leave. The judge here granted the application, and we have come to the conclusion, after having consulted the other members of the Court of Appeal, that the proper practice in future will be for the defendant to take out a summons before the judge at chambers to set aside the order and the service, and not to serve notice of motion either for the Divisional Court or for this Court. That being a matter of procedure, an appeal will then lie to this Court from an order made upon that summons, if leave be obtained.

LOPES and RIGBY L.JJ. concurred.

Solicitors for plaintiff: *Faithfull & Owen.*
Solicitors for defendant: *Lattey & Hart.*

A. M.

C. A.
1895
April 9.

[IN THE COURT OF APPEAL.]

BARTLETT *v.* FORD'S HOTEL COMPANY.

Practice—Arbitration—Stay of Proceedings—"Step in Proceedings"—Application for Extension of Time—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Where defendants had obtained an order for extension of time for delivery of defence :—

Held, that they had taken "a step in the proceedings" within the meaning of s. 4 of the Arbitration Act, 1889, and were therefore not entitled to apply for a stay of proceedings in the action under that section.

APPEAL of plaintiff from an order of Collins J. at chambers, dismissing an appeal from an order of a master staying proceedings in the action.

The action was for the price of work done under a building contract which contained a clause providing for arbitration in case of any dispute under the contract. The defendants had on three occasions applied to the plaintiff for, and obtained his consent to an extension of time for delivering their defence. On a fourth application the plaintiff refused to consent to a further extension of the time. The defendants then took out a summons at chambers for a further extension of time for a month, and obtained an order extending the time for fourteen days. The defendants subsequently applied for and obtained from the master an order for a stay of proceedings under s. 4 of the Arbitration Act, 1889. On appeal, Collins J. affirmed the order of the master. (1)

(1) Arbitration Act, 1889, s. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Edward Boyle, for the plaintiff. The defendants by applying and obtaining an order for an extension of time took a step in the proceedings within the meaning of the 4th section, and therefore were not entitled to apply for a stay of proceedings.

[He cited *Chappell* v. *North* (1); *Ives & Barker* v. *Willans*. (2)]

Arnold Statham, for the defendants. A step in the proceedings for the purposes of s. 4 means some onward movement in the litigation by which the defendant indicates his election that the action should proceed, and waives his right to have the matter in dispute referred. A summons for leave to administer interrogatories would no doubt be such a step. But this is a mere dilatory application for time which may be necessary in order that the defendants' advisers may consider whether they are entitled to have the matter referred, and whether it would be expedient that they should make an application for that purpose. There is nothing in such an application for time amounting to a waiver of the right to have the matter referred to arbitration.

[He cited *Brighton Marine Palace and Pier, Limited* v. *Woodhouse*. (3)]

LOPES L.J. The question which we have to decide arises under s. 4 of the Arbitration Act, 1889. It is whether taking out a summons upon which an order is made for an extension of time for delivering a defence is taking a step in the proceedings within the meaning of the section. The summons is taken out for the purpose of invoking the assistance of the Court to enable the defendants to proceed with their defence to the action. It seems to me impossible to say that it is not a step in the proceedings. Where an application for further time is made to the plaintiff's solicitor by letter, the case is different, for that is merely a matter taking place between the parties without the intervention of the Court. There is authority on this point. In the case of *Chappell* v. *North* (1) it was held that an application for leave to administer interrogatories was a step in the proceedings within the meaning of the section. Denman J. said in

(1) [1891] 2 Q. B. 252. (2) [1894] 1 Ch. 68; 2 Ch. 478.
(3) [1893] 2 Ch. 486.

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Lopes L.J.

that case: "But then it was said that the plaintiff had since the delivery of the counter-claim" taken steps in the proceedings, "and three different matters were relied on as being such steps. The first was that he had obtained a series of consents from the defendant for the extension of time for the delivery of reply. No doubt if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step." That observation of the learned judge appears to have been cited by North J. with approval in *Brighton Marine Palace and Pier, Limited* v. *Woodhouse*. (1) Then there is the case of *Ives & Barker* v. *Willans*. (2) In that case a notice by the defendant requiring a statement of claim was held not to be a step in the proceedings for this purpose. But in that case there is no intervention of the Court. In my opinion, this summons upon which an order was made extending the time for delivery of defence was clearly a step in the proceedings within the meaning of the section. I therefore think that the appeal should be allowed.

RIGBY L.J. I am of the same opinion. In this case our duty is to construe the words of the section. We cannot review the proceedings of the legislature, and say that something which is clearly within the words used in the section is not within their meaning on the ground that the legislature ought not to have so provided. The section, no doubt, provides a somewhat drastic remedy for an abuse which existed under the previous legislation on the subject, namely, that after causing much delay a defendant finally sought to compel a reference of the action. The defendants in this case appear to have acted in much the same way. They procured the consent of the plaintiff to an extension of time for delivery of defence on several occasions, and then they took out a summons for a month's further time. The intention of the section is that the application for a stay of proceedings shall be promptly made, and shall not be preceded by any other step in the action. The taking out of the summons upon which an order was made was, in my opinion, clearly a step in the proceedings within the meaning of the section. The

(1) [1893] 2 Ch. 486. (2) [1894] 1 Ch. 68; 2 Ch. 478.

authorities, so far as they go, tend in the direction of the conclusion at which we have arrived.

Appeal allowed.

Solicitors for plaintiff: *Munns & Longden.*

Solicitor for defendants: *W. L. Cooper, for Morgan & Co., Chepstow.*

E. L.

[IN THE COURT OF APPEAL.]

SEATON *v.* LORD DEERHURST.

Bankruptcy—Scheme of Arrangement—Debt provable in Bankruptcy—Rejection of Proof by Trustee—Scheme binding on Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 8; *s.* 30, *sub-s.* 2; *s.* 37, *sub-s.* 3.

A petition in bankruptcy having been presented and a receiving order made against the defendant, a scheme of arrangement was agreed to by his creditors, including the plaintiff, who was a judgment creditor. The trustee disallowed the plaintiff's proof on the ground that the judgment was in respect of a debt incurred in a gambling transaction. The plaintiff thereupon issued execution on the judgment. On an application to stay execution:—

Held, affirming the judgment of Pollock B., that the execution must be stayed, on the ground that the claim of the plaintiff was a debt provable in bankruptcy, and that he was therefore bound by the scheme although he had not received any benefit under it.

APPEAL from an order of a judge at chambers, affirming an order of a master setting aside a writ of fieri facias, and staying all proceedings by way of execution on the judgment obtained in the action.

A bankruptcy petition was presented against the defendant by a creditor, and a receiving order made thereon. The plaintiff, who had obtained judgment in this action and had received a part of the sum recovered, made an affidavit of proof of debt, and claimed to be creditor for the unpaid balance of the judgment.

At a meeting of creditors held in the bankruptcy proceedings a scheme of arrangement was proposed, and a resolution was passed to entertain the scheme, which was confirmed at a second general meeting. The scheme was approved by an order of the Court, and the receiving order was rescinded. The scheme

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provided for the payment of 10s. in the pound and interest on the balance remaining due from time to time, the payment of the balance being secured by a deed which dealt with certain reversionary interests of the defendant and insurances to be effected by him. Upon approval of the scheme by the Court and execution of the deed, the same was to be accepted by the creditors in full satisfaction and discharge of all debts due from the debtor and provable under the receiving order. Subsequently the trustee sent notice to the plaintiff that his claim was rejected on the ground that the consideration for the debt was illegal, the claim being in respect of racing bets. On appeal, Cave J. and the Appeal Court upheld the decision of the trustee. (1) The plaintiff subsequently issued a writ of fieri facias, which the master set aside, on the application of the defendant, and his order was affirmed by Pollock B.

The plaintiff appealed.

Muir Mackenzie, for the plaintiff. A creditor only accepts a scheme on condition that he receives a benefit under it; if he gets no advantage his acceptance ought not to bind him. By s. 18, sub-s. 8, of the Bankruptcy Act, 1883, a scheme accepted and approved is binding on all creditors so far as relates to debts provable in bankruptcy. The plaintiff's claim to prove has been rejected, and therefore he has no debt provable in bankruptcy, and is not bound by the scheme. The rule of bankruptcy law is that a debtor remains liable for debts that are incapable of proof in bankruptcy: *Linton* v. *Linton* (2); *In re Hawkins, Ex parte Hawkins.* (3)

Scott Fox, for the defendant. The expression "debts provable in bankruptcy" means debts that may be brought forward in bankruptcy proceedings, and a judgment that can be so brought forward is provable, although on going behind it no benefit can be obtained in the bankruptcy proceedings, owing to want of consideration for the debt on which the judgment is based. On rejection of a proof in bankruptcy the creditor cannot, after the annulment of the bankruptcy, enforce a judgment: *Brandon* v.

(1) *Re Deerhurst, Ex parte Seaton*, 8 Morr. 97.

(2) 15 Q. B. D. 239.

(3) [1894] 1 Q. B. 25.

McHenry (1); and the effect is the same under a scheme of arrangement, since debts in respect of which a composition is binding include all debts and liabilities which would be released by an order of discharge in bankruptcy: *Flint* v. *Barnard.* (2)

Muir Mackenzie, in reply.

LORD ESHER M.R. In this case a judgment was obtained against the debtor in respect of whom a receiving order was subsequently made. In the ordinary course the judgment creditor would prove for his judgment and receive a dividend in the bankruptcy, and his debt would be discharged. In this case, instead of proceedings in the bankruptcy, a scheme of arrangement was proposed by the debtor to his creditors, and accepted by them, and among others by this creditor. Under that scheme he was primâ facie entitled to come in and prove his judgment. It is said, however, that he is not bound by the scheme.

To see how this matter stands, we must refer to s. 37 of the Bankruptcy Act, 1883. By sub-s. 3 of that section, all debts and liabilities, save those excepted by the previous sub-sections, to which the debtor is subject at the date of the receiving order, are to be deemed debts provable in the bankruptcy. The judgment debt in this case was a liability to which the debtor was subject at the time of the receiving order, and it would have been, therefore, a debt provable in the bankruptcy. As the bankruptcy was not carried out, we must turn to s. 18, which deals with compositions or schemes of arrangement. Under sub-s. 8 of that section a composition or scheme of arrangement shall be binding on all creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy, and as by s. 37 this judgment is a debt provable in bankruptcy, the scheme is binding in respect of the judgment debt. The scheme follows the Act in treating of the satisfaction and discharge of all debts due from the debtor, and provable under the receiving order made against him. It is true to say that when the judgment creditor brought in his claim on the judgment, in order to secure a dividend on it, the trustee said, and said rightly, that he should go behind the judgment, and see if the claim on which it was

(1) [1891] 1 Q. B. 538. (2) 22 Q. B. D. 90.

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founded was one which entitled the creditor to a dividend, or at all events to a dividend at the same time with the other creditors. He found that the claim was for a gambling debt, and he accordingly declared that the judgment creditor was not entitled to participate with the other creditors. That finding does not in any way affect the construction of the Act as to what constitutes a debt provable in bankruptcy. The learned judge was quite right in his decision that the debt in respect of which execution had been issued was a debt provable in bankruptcy, and the appeal must be dismissed.

RIGBY L.J. I entirely agree with the judgment of the Master of the Rolls. I must admit that the point is new to me, and that at one time in the course of the argument I thought that, when a creditor did not obtain a dividend in bankruptcy proceedings, or proceedings under a composition or scheme of arrangement, he was not bound by the discharge of the debtor. I do not, however, see any answer to the argument founded on the words of the statute—that the claim of the judgment creditor is a debt provable in bankruptcy. If so, the judgment of the learned judge was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Hadden Woodward & Co.*
Solicitors for defendant: *Williams & James.*

A. M.

MOWBRAY AND ANOTHER *v.* MERRYWEATHER. 1895 *April* 2.

Damages—Contract—Breach—Remoteness.

The plaintiffs, a firm of stevedores, contracted to discharge a cargo from the defendant's ship, the defendant agreeing to supply all necessary and proper cranes, chains, &c., reasonably fit for the purpose of discharging the cargo. The defendant in breach of his agreement supplied a defective chain, which broke while being used, whereby one of the plaintiffs' workmen was injured. The defect in the chain might have been discovered by the plaintiffs by the exercise of reasonable care. The workman brought an action under the Employers' Liability Act, 1880, against the plaintiffs, who admitted their liability and paid him 125*l.*, which sum they now sought to recover from the defendant:—

Held, that the injury to the plaintiffs' workman was the natural consequence of the defendant's breach of contract; that, as between the plaintiffs and the defendant, the plaintiffs were entitled to rely on the defendant's warranty; and that, the plaintiffs being liable to their workman for the injury he had sustained, the money which they had paid to settle his action was recoverable by them from the defendant as damages for his breach of contract.

ACTION tried by Charles J. at Leeds without a jury.

Robson, Q.C., and *Meynell*, for plaintiffs.
Tindal Atkinson, Q.C., and *H. Gawan Taylor*, for defendant.

The facts and the arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

1895. April 2. The following written judgment was read by

CHARLES J. The facts of this case are very simple, and in all substantial particulars undisputed. The plaintiffs are stevedores at West Hartlepool, and the defendant is owner of the steamship *Wenby*. The plaintiffs on August 16, 1894, undertook to discharge a cargo of deals from the ship, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purpose of discharging the cargo. He failed to do so, and supplied a chain so defective that, whilst it was being used in discharge of the cargo, it broke, and thereby

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a workman of the plaintiffs was seriously injured. The injured workman thereupon brought an action against the plaintiffs under the provisions of the Employers' Liability Act, 1880, ss. 1, 2, basing his claim upon the defective condition of the chain—a defective condition which, he alleged, might have been discovered by the plaintiffs by the exercise of reasonable care. The plaintiffs did not contest the action, and paid the workman 125*l.*, which they now sought to recover from the defendant. It was not suggested by the defendant that the settlement was an improper one, and it was admitted upon the trial before me at the last Leeds Assizes, by the defendant on the one hand, that there had been a breach by him of the implied warranty that the derrick, cranes, and chains should be reasonably fit for the purpose for which they were supplied; and by the plaintiffs, on the other, that they might, by the exercise of reasonable care, have discovered the defect in the chain. The defendant, however, contended that the damage sought to be recovered was too remote, and I reserved my decision on this point.

The argument of the defendant was to the following effect. True it was, he said, that there was a breach of warranty, but the damages which the plaintiffs had to pay resulted, not from that breach, but from a negligent act committed by the plaintiffs themselves. They were not responsible at common law merely for permitting the workman to use a plant in fact defective and unfit for the purpose for which it was intended to be used. They were only liable under the Employers' Liability Act, 1880 (which in this respect, however, seems simply declaratory), by reason of the defect being one which had not been discovered owing to their own negligence. The damage to the workman, therefore, was caused by their own want of care, and could not be imputed to the defendant as the natural consequence of his breach of warranty. The plaintiffs in reply contended that they had a right to rely upon the defendant's warranty. As between him and them the cause of action was complete, and the negligence of which they had been guilty—the failure to carefully examine and test the chain—was really due to the reliance they placed on the defendant's warranty. The workman, it was further argued, could himself have recovered damages against the

defendant; and, according to the most limited construction which can be placed on the judgment of the Court of Appeal in *Heaven* v. *Pender* (1), this argument, at all events, seems well-founded. The case of *Smith* v. *London and St. Katharine's Docks Co.* (2) is an authority to the same effect.

The amount paid by the plaintiffs being admitted to be reasonable, the only question I have to determine is whether the damage done to the workman, and which he could only recover from the plaintiffs by shewing want of care in them, may nevertheless be regarded as the natural consequence of the defendant's breach of contract; or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties. Now, the defendant cannot have supposed that the plaintiffs meant themselves to unload the ship. He must be taken to have known that the plaintiffs would employ others to do so; and, in my opinion, injury to a person so employed is a natural consequence of the breach of warranty. Does it make any difference that the plaintiffs were themselves guilty of want of care? I cannot think so. The breach of the warranty upon which the plaintiffs relied, and as far as the defendant is concerned had a right to rely, remains, and is the efficient cause of the subsequent mischief. As regards the workman, they may have been guilty of negligence in not themselves testing the efficiency of the chain; but I do not see how their failure in their duty towards him exonerates the defendant from his failure to perform his contract with them. His breach of contract created a dangerous state of things which has brought about an accident, and for that accident he must, in my opinion, be held responsible, even though the plaintiffs' negligence was the immediate cause of it. There does not appear to be any very direct authority upon the subject; but I may observe that the reasoning of Martin B. in *Burrows* v. *March Gas and Coke Co.* (3) entirely covers the case. There the defendants, a gas company, contracted to supply the plaintiff with a proper service-pipe from a main outside to a meter inside his premises, and gas escaped from a defect in the pipe. A servant of a gasfitter incautiously

(1) 11 Q. B. D. 503. (2) Law Rep. 3 C. P. 326.
(3) Law Rep. 5 Ex. 67; 7 Ex. 96.

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went into the room with a lighted candle, and the lighted gas exploded. The defendants were held liable for all the damage done; and Martin B. expressly states that the liability of the defendant would have been the same even if the gasfitter's servant had been the plaintiff's own. The other judges in the Court of Exchequer and the Exchequer Chamber base their decision upon the principle that the breach of contract was the primary and substantial cause of the explosion, and that so it remained notwithstanding the negligence of the gasfitter. The defendant, the Court considered, must be held to have contemplated the possibility of careless persons bringing light into contact with escaping gas.

On behalf of the defendant three cases were cited: *Wrightup* v. *Chamberlain* (1), *Kiddle & Son* v. *Lovett* (2), and *Ovington* v. *McVicar* (3), a decision in 1864 of the Court of Session. In *Wrightup* v. *Chamberlain* (1) the plaintiff had bought a horse of the defendant with a warranty of soundness. The horse having been delivered, he resold it with a similar warranty. It was in fact unsound, and the purchaser from the plaintiff sued him for the breach of warranty. He defended the action unsuccessfully, and sought to recover from the defendant the costs of the defence. The jury found that he might before he defended the action have found out by examining the horse that it was unsound, and upon this finding it was held that he could not recover the costs of what was a rash and improvident defence. It is obvious that this decision has little or no bearing upon the present case. In *Kiddle & Son* v. *Lovett* (2), however, the facts were in many respects very similar to those proved or admitted here. A suspended platform was put up for the plaintiffs by the defendant, under a contract that he would fix it safely, to enable the plaintiffs to paint a house. The platform fell owing to the defective manner in which it was suspended, and hurt one of the painters in the plaintiffs' employment. The injured man brought an action under the Employers' Liability Act, 1880, against the plaintiffs, which they settled by paying him 125*l*. They then sued the defendant for breach of his contract. The cause was tried before

(1) 7 Scott, 598.

(2) 16 Q. B. D. 605, 612.

(3) 2 Macpherson, 1066.

Denman J., who found as a fact that the plaintiffs had been guilty of no negligence, and that they had settled the action under a mistaken belief in their own liability. That being so, the learned judge thought that they had no right to fix the defendant with the amount they had paid as damage naturally or necessarily flowing from the defendant's breach of contract. The payment was one which need not have been made at all. The question, therefore, which is now before me did not arise, and it is only referred to by the learned judge at the close of his judgment with the observation that it was unnecessary to give any opinion upon it. "The point," he says, "is discussed in the 3rd edition of Messrs. Roberts and Wallace's valuable book on the liability of employers, p. 471, and a Scotch case of *Ovington* v. *McVicar* (1) is cited in the note as supporting the view that the damages in such a case [would] be too remote." But upon reference to that case, I find that the judges all thought that the master who had extrajudicially settled a workman's claim was not under any legal liability to the workman. In that respect the case is exactly similar to *Kiddle & Son* v. *Lovett* (2); but the Lord Justice Clerk and the other judges of the Court do express an opinion that, even if the master had been legally liable to the workman, he could not have made the defendant responsible. With all respect, I am unable to agree with them; and the case, having been actually decided upon the ground that no liability for latent defect in machinery, against which no care could have effectually guarded, existed in the master, does not constitute an authority for the present defendant. My judgment must be for the plaintiffs for 125*l.* with costs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Higson Simpson, West Hartlepool.*
Solicitors for defendant: *Turnbull & Tilley, West Hartlepool.*

(1) 2 Macpherson, 1066.

(2) 16 Q. B. D. 605.

W. J. B.

1895
Feb. 12.

GREAT NORTHERN RAILWAY COMPANY *v.* PALMER.

Railway—Passenger—Fare—Condition on Ticket—Ticket used for Station beyond that at which it is Available—Forfeiture of Ticket.

The defendant, a passenger on the plaintiffs' railway, took a special excursion ticket entitling her to travel from P. to W. at a fare considerably lower than the ordinary fare; the ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. The defendant travelled to, and returned from, H., a station beyond W., paying the ordinary fare for the journeys between W. and H.; the total amount paid by the defendant was much less than the ordinary return fare between P. and H.:—

Held, that the condition was applicable to stations beyond that named on the ticket as well as to intermediate stations; that the defendant had used the ticket for a journey to a station other than that named on it, and not merely for a journey to the station for which it was available, and that the plaintiffs were therefore entitled to treat the ticket as forfeited.

APPEAL from the judge of the Huntingdon County Court.

On August 4, 1894, the defendant took at Peterborough a return ticket from Peterborough to Woodhall Spa; the ticket was a cheap excursion ticket available for the outward journey on the day of issue only, and for the return journey up to August 7; the price was 4*s.* 6*d.* Upon the face of the ticket in the bottom corner were the words "See back" in small print, and on the back, also in small print, were the words, "if used for any other train or station than that named this ticket will be forfeited and the full fare charged." The defendant travelled by the excursion train to Woodhall Spa and went further on to a station called Horncastle, the fare to which place from Woodhall Spa is 5½*d.*, and tendered at Horncastle the outward half of her excursion ticket together with the sum of 5½*d.*, which was refused by the ticket collector. On August 7 she returned, paying 5½*d.* for a ticket from Horncastle to Woodhall Spa, and using the return half of her excursion ticket for the distance between Woodhall Spa and Peterborough. The ordinary single fare from Peterborough to Woodhall Spa is 3*s.* 11½*d.*, and the return fare 7*s.* 11*d.*; the ordinary single fare from Peterborough to Horncastle is 4*s.* 5½*d.*, and the return fare 8*s.* 11*d.* The plaintiffs claimed to be entitled to treat the ticket issued to the defendant as forfeited, and brought this action to recover the

full return fare from Peterborough to Horncastle and back, or in the alternative the difference between that sum and the amount actually paid by the defendant. The defendant paid into court 5½*d.* in respect of the journey from Woodhall Spa to Horncastle, which sum had been tendered by her on her arrival at Horncastle, but refused. It was admitted that the defendant, who did not appear at the trial in the county court, had acted bonâ fide under the belief that she was entitled to use the ticket as she had done. The learned county court judge nonsuited the plaintiffs, but gave leave to appeal. Upon the appeal the plaintiffs only asked for judgment for the difference between the fares, and did not ask for the full fare payable on the ticket being forfeited.

C. A. Russell, for the plaintiffs. The contract between the parties only entitled the defendant to travel from Peterborough to Woodhall Spa and back, and she actually travelled on a journey other than that contracted for. She used the ticket for a station other than that named on it, and under the condition, of which (in the absence of a finding to the contrary) she must be held to have had notice, the ticket was forfeited. The learned judge was wrong in holding that the condition only applied to the use of the ticket at an intermediate station, and not at a station beyond that to which it was issued; it applies to all stations other than that named on it. If it is open to the defendant to contend that she had no notice of the condition, it is submitted that the plaintiffs took all reasonable measures to bring knowledge of it home to the plaintiff. [He cited *Great Northern Ry. Co.* v. *Winder* (1); *Reg.* v. *Frere.* (2)]

C. F. Pritchard, for the defendant. The nonsuit was right. The defendant did not use the ticket for a journey to Horncastle, nor in part payment of the fare for such a journey. The contract between the parties was completely performed when the defendant reached Woodhall Spa, and she was then entitled to go on beyond that station, subject only to the right of the plaintiffs to prevent her from going on to Horncastle without a ticket. Even assuming that the condition on the back of the

(1) [1892] 2 Q. B. 595. (2) 4 E. & B. 598; 24 L. J. (M.C.) 68.

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ticket was brought to the defendant's knowledge and formed part of the contract, she did not forfeit it by using it as she did, for the proviso that it is not to be used for "any other station" means any intermediate station between the termini named on the ticket; it does not apply to a station beyond that to which the ticket-holder is entitled to travel. But the plaintiffs did not do what was reasonably sufficient to give the defendant notice of the condition. [He cited *Great Western Ry. Co.* v. *Pocock* (1); *Richardson, Spence & Co.* v. *Rowntree.* (2)]

WILLS J. This case is, in my opinion, a very clear one upon the only point open to us, for I do not think that the question whether there was evidence to fix the defendant with notice of the condition arises for our consideration. Assuming that the indorsement upon the ticket formed part of the conditions of the contract between the parties, I think that the plaintiffs were entitled to treat the ticket and the money paid for it as forfeited; and although they are not taking that course, but are treating the money paid as having been paid in reduction of the fare between Peterborough and Horncastle, we must regard the case from the point of view of their right to claim the forfeiture. No one can doubt that the practice of railway companies in making special contracts for carrying passengers on special terms at low fares is a great boon to the community; and if a railway company running an excursion train at cheap fares to a place within a few miles of London were bound to treat that journey as part of a journey from the starting-point to London, and were therefore only able to charge a passenger travelling on beyond the terminus of the excursion to London the extra fare between those places, this most useful practice would be put a stop to. When a passenger takes a special ticket to a named place and back at a cheap fare, the carriage of the passenger to that place and back is the only service which the railway company contracts to perform; it cannot, if the passenger goes on to another station, be treated as part of the service rendered by the company in taking him to a place to which they did not contract to carry him. In my judgment the practice is a right and reasonable one, and one which,

(1) 41 L. T. (N.S.) 415. (2) [1894] A. C. 217.

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on grounds of public policy, ought to be favoured. I have no doubt that in the present case the condition formed part of the contract, and I am quite unable to see upon what ground a condition not to use a ticket for "any other station" than that named on it can be confined to intermediate stations; it is equally applicable to stations beyond the named terminus of the journey. I think that when the defendant went on beyond Woodhall Spa she was making a journey from Peterborough to Horncastle, and was not making a second and separate journey; whether she intended to do so or not at the time of taking her ticket is immaterial; the facts shew that she elected to make a different journey to that for which she bargained. I think, therefore, that her ticket was forfeited, and that the claim of the plaintiffs is good. The point as to bringing home notice of the condition to the defendant is, as I have said, not open to us; if it were, I am inclined to think that it would be a question whether the plaintiffs did do what was reasonably sufficient.

WRIGHT J. I agree. Though two questions might have been raised in this case, only one has been, and as to that I entirely agree with all that has been said by my brother Wills. But I cannot entirely pass over the other point; and if the defendant had appeared at the trial in the county court and had raised the point, I should have felt very serious doubt whether the plaintiffs had done enough to fix the defendant with notice of the condition. The words "See back" are not in a conspicuous place, and are in very small type; and the condition on the back is likewise in very small print. I should hesitate long before holding that the plaintiffs had done what was reasonable; but we cannot decide the point.

Appeal allowed.

Solicitors for plaintiffs: *Nelson, Barr & Nelson.*
Solicitors for defendant: *Young & Sons.*

W. J. B.

1895
Feb. 12.

IN RE AN ARBITRATION BETWEEN GRIFFITHS AND MORRIS.

County Court—Jurisdiction of Registrar—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61)—*Appointment of Referee under—County Court Rules*, 1889, *Order* XL., *r.* 7—*Costs.*

The power given to the county court by s. 9, sub-s. 6, of the Agricultural Holdings Act, 1883, to appoint a referee to act on behalf of a party to a reference under that Act is by s. 11 to be exerciseable by the judge, unless the parties consent to its exercise by the registrar; so much, therefore, of Order XL., r. 7, of the County Court Rules, 1889, as provides that an application to appoint such referee may be disposed of by the registrar unless one of the parties gives a written notice of his desire that it be heard before the judge is ultra vires and bad.

A referee or umpire making an award under the Agricultural Holdings Act, 1883, cannot order costs to be paid as between solicitor and client.

APPLICATION under Order LIX., r. 8A, for a prohibition to the judge of the Carnarvonshire County Court, prohibiting any further proceedings being taken upon an order made by him under s. 24 of the Agricultural Holdings Act, 1883, for the enforcement of an award under that Act.

The facts, as shewn in the affidavits, were shortly these. One Griffiths was tenant to the applicant, Mrs. Morris, of a farm; before the determination of his tenancy he gave to the applicant the requisite notice under the Agricultural Holdings Act, 1883, of his intention to make a claim for compensation under the Act; he subsequently appointed a referee to act for him in the reference, and gave notice under s. 9 to the applicant to appoint a referee to act for her. The applicant having failed to comply with the notice, Griffiths took out a summons under Order XL., r. 7, of the County Court Rules, 1889, for the appointment of a referee by the county court to act on behalf of Mrs. Morris. The applicant took no notice of the summons, and the summons was disposed of by the registrar, who appointed one Roberts to act as referee on her behalf; no consent was given to this course by or on behalf of the applicant. The referees having differed, the umpire made an award, which recited that Roberts had been appointed referee by order of the county court of Carnarvonshire holden at Carnarvon; the umpire awarded a sum to

Griffiths as compensation; he further ordered that the costs of the proceedings in the county court for the appointment of a referee should be paid by Mrs. Morris as between solicitor and client, and that she should pay one-half of Griffiths' costs of the reference as between solicitor and client. The applicant having failed to comply with the award, an application was made under s. 24 to the county court judge, who made an order that the amount of the sum awarded and the costs should be paid, and appointed the high bailiff receiver of the applicant's life interest. The present application for a prohibition was then made. (1)

Danckwerts, for the applicant. The power given by s. 9, sub-s. 6, of the Act to the county court to appoint a referee is by s. 11 exerciseable by the county court judge, and is only exerciseable by the registrar by consent of the parties; no consent was here given, and the order appointing Roberts a referee was made without jurisdiction. Order XL., r. 7, of the County Court Rules, so far as it purports to give jurisdiction to the registrar, in the absence of a notice from one of the parties

(1) By s. 9 (6) of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), "If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee."

By s. 11, "The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exerciseable by the judge of the Court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the Court."

By Order XL., r. 7, of the County Court Rules, 1889, an application for the appointment of a referee is to be made by summons. "Such summons shall be taken out by the party applying, and shall be addressed to the other party, and shall direct the party summoned to attend before the judge or registrar (as the case may be) in chambers on the return day thereof; for the purpose of proceeding with the appointment asked for. . . . If either party should desire that such application be heard before the judge, he shall give notice in writing to the registrar two clear days at least before the day fixed for the hearing of the application, and in such case the application will come on before the judge on a day to be fixed by the registrar. If no such notice be given, then the application may be disposed of by the registrar, who shall have power to adjourn the application, if he shall think fit, for hearing by the judge."

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requiring the application to be heard before the judge, is ultra vires and bad; it cannot overrule the express provisions of the Act of Parliament. The case is within *Farquharson* v. *Morgan* (1), for total absence of jurisdiction appears on the proceedings, the invalid appointment of Roberts as referee being recited on the face of the award. It is immaterial whether, as in that case, compensation is awarded for matters which are not the subject-matter of a reference under the Act, or whether, as here, the award is made in a way not authorized by the Act. There was no power under s. 20 to deal with the costs of the application to the county court, and the umpire had no jurisdiction to award costs as between solicitor and client.

E. Honoratus Lloyd, for the tenant. Order XL., r. 7, is not inconsistent with the provisions of the Act of Parliament, and is not ultra vires; sect. 11 enacts that the judge may make the order appointing a referee, and that the registrar may make it by consent; and Order XL., r. 7, merely provides the machinery for carrying out the statutory provisions. The umpire had power to deal with the costs of the application to the county court, which were "other proper expenses" within the meaning of s. 20 of the Act, and were not costs of proceedings in the county court within s. 27. The order giving costs as between solicitor and client is, at the worst, mere surplusage; the costs must be taxed by the registrar, whether under s. 20 or s. 27, and he can only tax them on one scale, whether that is called solicitor and client or party and party.

WILLS J. I am of opinion that the prohibition must go. The application for the appointment of a referee was heard by the registrar, and it appears from the proceedings of the county court that it was heard, and the order made, by him without consent. If we had only the Act of Parliament to consider it is clear that the order could not be sustained, for an essential condition of the registrar's jurisdiction is lacking. But it is said that the defect is cured by Order XL., r. 7, of the County Court Rules, which provides for the procedure in such applications to the county court. The early part of that order provides

(1) [1894] 1 Q. B. 552.

that the summons is to direct the party summoned to attend before the judge or registrar (as the case may be) in chambers, and the only meaning which I can attach to the words "as the case may be" is that he is to attend before the judge if there is no consent to the registrar having jurisdiction, and before the registrar if there is such consent; so far the rule is entirely in accordance with the provisions of the statute. But then comes the portion of the rule on which the tenant relies, that if either party desire the application to be heard by the judge he is to give notice in writing to the registrar, and in my judgment that provision plainly goes beyond the Act of Parliament: it amounts to saying that the giving of the notice by the one party and the silence of the other shall operate as evidence of their having respectively consented to the jurisdiction of the registrar, and such a doctrine would be plainly contrary to general principles. Nothing short of an Act of Parliament would make such a provision valid; most certainly these rules could not. The provision in the rule might be useful where, although consent had been given to the registrar's jurisdiction in the first instance, one of the parties wished to go before the judge; it can have no application to the facts of the present case. It is clear, therefore, that Mr. Roberts was not properly appointed under the Agricultural Holdings Act, and that his appointment was a nullity.

On the subsidiary point, which is one of trivial importance, I am clearly of opinion that s. 20 of the Act gives no power to award that the costs of the reference shall be paid as between solicitor and client. The section is quite clear: it gives power to determine the proportion in which the costs are to be paid if the whole are not directed to be paid by one party, but it gives no larger power. I do not attach any importance to the suggestion that the costs will be taxed on the same scale, whether they are awarded as between party and party or as between solicitor and client; that may be the case in ordinary county court proceedings, but these proceedings are wholly outside the ordinary county court jurisdiction, and in the taxation of the general costs of a reference there must, I think, be a difference between party and party and solicitor and client costs. The point is a

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trivial one, and I should not grant a prohibition upon that ground alone; but the first objection is fatal.

WRIGHT J. I agree. By s. 22 an award can only be questioned in the manner provided by the Act, and the only provision for questioning an award is by appeal to the county court judge where the claim exceeds 100*l.*, which was not the case in the present instance. But that enactment only applies where there is in fact and in law an actual award; it does not apply where the proceedings are coram non arbitro, and there is no valid award. Prohibition is therefore a proper remedy in such a case as the present, and I entirely agree with my learned brother that prohibition ought to go.

Order for prohibition.

Solicitors for applicant: *Lloyd-George & Co., for Lloyd-George & George, Criccieth.*

Solicitor for respondent: *L. W. Byrne, for Henwood, Carnarvon.*

W. J. B.

1895

April 3.

STUDHAM *v.* STANBRIDGE. STANBRIDGE, CLAIMANT.

County Court — Costs — Interpleader Proceeding — "Subject-matter" — The County Court Rules, 1889, *Order* L. *A, r.* 12—*Higher Scale of Costs, Col. C.*

Column C of the higher scale of costs in force in county courts applies "where the subject-matter or sum recovered exceeds 50*l.*"; and by Order L. A, r. 12, of the County Court Rules, 1889, "the 'subject-matter' in an interpleader proceeding shall mean, in the case of a claimant, the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged."

The claimant, in an interpleader proceeding to try the right to goods seized in execution on a judgment in the county court, paid into court 36*l.* to meet the amount in respect of which the execution was issued and all costs. At the trial of the claim, the county court judge adjudged that the claimant was entitled to all the goods seized and 10*l.* damages, with costs, and that the value of the goods seized was 51*l.*:—

Held, that the claimant was entitled to have his costs taxed according to Col. C of the higher scale, because the "subject-matter" of the interpleader

proceeding was the amount (plus the damages) found by the judge to be the value of the goods seized, and not the amount (plus the damages) paid into court.

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APPEAL from an order made by the judge of the Croydon County Court.

Judgment having been recovered against the defendant in an action in the county court, execution was issued, and the high bailiff seized goods upon the judgment debtor's premises to satisfy the judgment debt and costs, which amounted to about 31*l.* The goods so seized were claimed by the debtor's father; and, upon a summons obtained by the bailiff, interpleader proceedings were commenced, in which the claimant claimed, as against the execution creditor, the value of the goods seized and damages. A sum of 36*l.* was paid into court by the claimant, not as being the value of the goods seized, but as being a sufficient sum to satisfy the amount for which the execution had been issued and all costs. Upon such payment into court the bailiff withdrew from possession. At the trial of the claim, the county court judge adjudged that the claimant was entitled to all the goods seized and 10*l.* damages, with costs, and that the value of the goods seized was 51*l.* Subsequently, upon an application for a direction to the registrar as to the taxation of the claimant's costs, the judge ordered that they should be taxed on the higher scale, Col. C, in force under the County Courts Act, 1888 (51 & 52 Vict. c. 43), and the County Court Rules, 1889. The execution creditor appealed from that order.

Horne Payne, Q.C., for the execution creditor. The amount paid into court was the "subject-matter" in this interpleader proceeding, within the meaning of Order L. A, r. 12, of the County Court Rules, 1889. In *Brown* v. *Lilley* (1) Mathew J. is reported to have expressed an opinion that the subject-matter must be determined by the amount paid into court. *White & Co.* v. *Milne* (2) is also an authority in favour of the same view. Col. C of the higher scale does not, therefore, apply here.

Colam, for the claimant. The words "the value of the goods" in Order L. A, r. 12, mean the real value, which in this case

(1) 7 Times L. R. 427. (2) 58 L. T. 225.

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has been found by the county court judge. The observations of Mathew J. in *Brown* v. *Lilley* (1) were obiter merely. They were only meant to apply where, as in that case, the amount had been paid in under an order. In *White* v. *Milne* (2) there had been an appraisement of the goods under s. 72 of the County Courts Act, 1856, and that was the only evidence before the Court of their value. The case, therefore, is distinguishable from this. The order of the county court judge was rightly made.

Horne Payne, Q.C., replied.

CAVE J. I am of opinion that this appeal should be dismissed. The point raised is as to the meaning of Order L. A, r. 12, of the County Court Rules, 1889. The higher scale of costs in force in the county court is threefold. Col. A applies to cases where the subject-matter or the sum recovered exceeds 10*l.* and does not exceed 20*l.*; Col. B where it exceeds 20*l.* and does not exceed 50*l.*, and Col. C. where it exceeds 50*l.* The question here is whether the claimant's costs come under Col. C, as the learned county court judge has decided, or whether they do not. Rule 12 provides that in interpleader proceedings the "subject-matter" shall mean in the case of a claimant (which is this case) "the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged." Now, here the county court judge has found that the amount of the value of the goods the claim to which was allowed was 51*l.*, and he has adjudged 10*l.* damages. Col. C therefore applies, because the subject-matter exceeds 50*l.* But for the case of *Brown* v. *Lilley* (1), which is relied on for the execution creditor, I should have wondered that any doubt could arise in the matter. That case illustrates the evils of indiscriminate reporting. I very much doubt whether it has any bearing at all upon the present case; but it is clearly no authority upon the construction of rule 12. The observations of Mathew J. were mere obiter dicta. It does not appear from the report that the point now before us was taken by counsel, or that rule 12 was called to the attention of the Court. The decision may have been right in that particular case, but it is no authority to govern

(1) 7 Times L. R. 427. (2) 58 L. T. 225.

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this. It has been contended that the subject-matter in the interpleader proceeding here was the 36*l.* deposited to meet the amount for which the execution was issued and costs. I am clearly of opinion that it was not. It was necessary for the claimant to go on and prove, not only that goods seized of the value of 36*l.* belonged to him, but that the whole of the goods seized belonged to him. He went on and proved, as the judge found, that the whole of the goods seized belonged to him; that their value amounted to 51*l.*, and that he had sustained 10*l.* damages. The subject-matter, therefore, exceeded 50*l.*, and the judge was right in making the order appealed against.

LAWRANCE J. concurred.

Appeal dismissed.

Solicitor for appellant: *J. S. Streeter, Croydon.*
Solicitor for respondent: *S. G. Edridge, Croydon.*

W. A.

HOOD BARRS *v.* CATHCART.

1895
March 9.

Husband and Wife — Counter-claim by Married Woman — "Proceeding Instituted"—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

By s. 2 of the Married Women's Property Act, 1893, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just":—

Held, that a counter-claim in an action against a married woman was a "proceeding instituted" within the meaning of the above section, and that, the counter-claim having been dismissed, there was jurisdiction to order the plaintiff's costs thereof to be paid out of the defendant's life estate notwithstanding any restraint upon anticipation:

Held, further, that where an order had been made dismissing an application by the defendant, a married woman, with costs, the Court or a judge had power in a subsequent order appointing a receiver to direct that those costs should be paid out of property subject to a restraint on anticipation.

APPEAL from an order of Wright J. at chambers, appointing a receiver of the property of the defendant, a married woman.

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The action was brought upon a bill of exchange, and the defendant counter-claimed for damages for alleged negligence of the plaintiff as a solicitor. The plaintiff recovered judgment on his claim in the action, which judgment was affirmed by the Court of Appeal on August 11, 1893, leave being given to the defendant to prosecute her counter-claim against the plaintiff. An order was subsequently made at chambers dismissing the counter-claim. Between February 3 and July 26, 1894, various interlocutory applications in relation to the counter-claim were made by the defendant in chambers and by way of appeal to the Divisional Court and the Court of Appeal, all of which were dismissed; in some of the orders the application was simply dismissed with costs, the orders being silent as to the removal of any restraint upon anticipation. On October 9, 1894, the plaintiff obtained from Wright J. at chambers an order appointing a receiver of the rents due and in arrear and accruing due from the defendant's life estate in certain messuages and lands notwithstanding any restriction against anticipation: by it the receiver was directed (inter alia) to pay the money received by him in or towards satisfaction of what might be due in respect of the above-mentioned orders. The defendant appealed.

T. Willes Chitty, for the defendant. The receivership order is bad in so far as it orders payment of the costs given to the plaintiff by the previous orders; there is no jurisdiction under s. 2 of the Married Women's Property Act, 1893, to make such an order. A counter-claim is not an action or proceeding instituted by a married woman within the meaning of that section, and therefore these costs cannot be directed to be paid out of any of her property which is subject to a restraint on anticipation. In *Hood Barrs* v. *Cathcart* (1) the Court of Appeal said that the "proceeding instituted" meant a proceeding in which a *lis* was initiated: a *lis* is the whole proceeding between the parties, and the only person who can institute proceedings is the plaintiff. Secondly, there was no power by this order, which directs payment out of the defendant's life estate notwithstanding any restraint on anticipation, to vary the original orders,

(1) [1894] 3 Ch. 376.

which simply gave costs against the defendant; the order removing the restraint cannot be made subsequently to that by which the costs are given.

Cock, Q.C., and *Bartley Denniss*, for the plaintiff, were not called on.

MATHEW J. In my judgment this appeal should be dismissed. The first question for our determination is whether a counter-claim is a proceeding instituted by a married woman within the meaning of s. 2 of the Married Women's Property Act, 1893, and it is noticeable that the section contains, besides the expression "action or proceeding," the expression "opposite party." It is contended in effect that the section only applies where an action is instituted by a woman as plaintiff, and that "opposite party" can only mean the defendant. I am unable to follow that contention. It is perfectly clear that a counter-claim is equivalent to a cross-action, and is instituted as a cross-action; there is the closest analogy between raising a counter-claim and instituting an action. The defendant contends that a narrower construction has been placed on the section by the Court of Appeal; but that Court decided no more than that an appeal by a married woman who was defendant in an action was not a proceeding within the meaning of the section, and in that decision I respectfully concur. The particular point raised to-day was not presented to the Court of Appeal in that case, which seems to be no authority against that which we are now deciding. Upon the second point I am clearly of opinion that my brother Wright had power to make the order which he did.

CAVE J. I entirely agree.

Appeal dismissed.

Solicitors for plaintiff: *Hood Barrs & Co.*
Solicitor for defendant: *H. R. Elton.*

W. J. B.

1895
April 1.

REDGRAVE, APPELLANT; LLOYD & SONS, LIMITED, RESPONDENTS.

Factory Acts—Dangerous Machinery—Duty to Fence—Factory and Workshop Acts, 1878 (41 & 42 *Vict. c.* 16), *s.* 5; 1891 (54 & 55 *Vict. c.* 75), *s.* 6.

By s. 5, sub-s. 3, of the Factory and Workshop Act, 1878, "Every part of the mill gearing" in a factory shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced.

By s. 6 of the Factory and Workshop Act, 1891, the words "all dangerous parts of the machinery and" shall be inserted in s. 5, sub-s. 3, of the Act of 1878 before the words "every part":—

Held, that the words "all dangerous parts of the machinery" in s. 6 of the later Act were not limited to such machinery as supplied or conveyed the motive power to the machines by which the industrial operations of the factory were immediately effected, but that those words applied to all the machinery in the factory.

CASE stated, under the Summary Jurisdiction Acts, by one of the metropolitan police magistrates.

The appellant, one of Her Majesty's inspectors of factories, preferred an information and complaint before the magistrate at the Southwark Police Court, alleging that the respondents were the occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1878 (41 & 42 Vict. c. 16) and 1891 (54 & 55 Vict. c. 75), in which factory a person named F. Robson, on a date specified, suffered bodily injury in consequence of the respondents having neglected to fence securely certain dangerous machinery required in pursuance of the said Acts to be securely fenced—to wit, a power press.

The following material facts were stated in the case:—

The respondents are tin box manufacturers, and Robson, who is fourteen years of age, was employed by them in their factory at Mill Street, Dockhead, to work a power press used for the purpose of shaping tin plates for the manufacture of tin boxes, cans, &c.

The press is worked by steam-power; the operator throws the machine into gear by placing his foot upon a treadle which causes the upper die to descend upon the lower die. The motion

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is communicated to the upper die, which works up and down inside the fixed part of the machine, by a fly-wheel at the side driven off the main shaft overhead. The lower part of the machine is a sort of table in which the lower die is fixed; the piece of tin is placed upon the lower die, and the upper die comes down with great force and stamps the tin as required. In the event of a piece of tin adhering to the die, the operator removes it by pushing it off with a piece of stick provided for the purpose.

It was Robson's duty when working the machine to place a piece of tin upon the lower die, and by means of the treadle to cause the upper die to descend upon it, and to remove any piece of tin that might adhere to the die as before stated. Whilst he was endeavouring to remove a piece of tin which adhered to the upper die by pushing it off at the side with a stick, his hand slipped under the die, and the tip of one of his fingers was cut off.

The machine was not constructed, or fenced, or protected in such a way as to prevent the hand of a person attempting to remove a piece of tin from the sides of the die from slipping under the upper die, which, when at its highest point, was about one inch from the lower die.

The magistrate, without determining whether or not in point of fact the press was dangerous, held that the part of the power press where the upper die came in contact with the lower, and, where the accident happened, was not a part of dangerous machinery, or any machinery, which was required by the Factory and Workshop Act, 1878, as amended by the Factory and Workshop Act, 1891, to be securely fenced, and upon that ground he dismissed the summons.

The question for the opinion of the Court was whether the magistrate's construction of the statutes was correct and his decision right.

Henry Sutton, for the appellant. The part of the machinery where the accident happened was clearly machinery which is required to be securely fenced by the Factory and Workshop Act, 1878, s. 5, as amended by the Factory and Workshop Act,

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1891, s. 6, sub-s. 2. (1) The amendment made by s. 6 was intended to extend the obligation to fence to those parts of the machinery in factories which were not within the provisions of s. 5 of the earlier Act.

[He was stopped.]

A. J. Walter, for the respondents. Sect. 5 of the Act of 1878, as amended by s. 6 of the Act of 1891, has reference only to such things as are specified in s. 5, and to machinery which supplies or conveys the motive power to the machines by which the industrial operation is carried on. The words in s. 6 of the later Act, "all dangerous parts of the machinery," relate to machinery ejusdem generis as the machinery dealt with in s. 5 of the earlier Act. Sect. 6 of that Act dealt with machinery to which the provisions of s. 5 with respect to fencing did not apply, and provided for a notice to be served by the inspector on the occupier of the factory requiring him to fence the part of the machinery which the inspector deemed to be dangerous. The occupier was then entitled to require the matter to be referred to arbitration in order to have decided the questions whether it was necessary or possible to fence the machinery, and he could not be compelled to fence unless the arbitrators or their umpire decided that it was necessary and possible to fence, or unless he had failed to

(1) The Factory and Workshop Act, 1878 (41 Vict. c. 16), s. 5: "With respect to the fencing of machinery in a factory the following provisions shall have effect:—

"(1.) Every hoist or teagle . . . and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine-house or not, and every part of a steam-engine and water-wheel, shall be securely fenced; and

"(2.) Every wheel-race not otherwise secured shall be securely fenced close to the edge of the wheel-race; and

"(3.) Every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced. . . .

"A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act."

Sect. 81: "If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding 10*l*."

The Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 6, sub-s. 2, enacts that in sub-s. 3 of s. 5 of the Factory and Workshop Act, 1878, before the words "every part" shall be inserted the words "all dangerous parts of the machinery and."

require an arbitration, or had not appointed an arbitrator in accordance with the requirements of the section. Sect. 6 of the Act of 1878 is repealed by s. 39 and the 2nd schedule of the Act of 1891, but s. 8 of the Act of 1891 is substituted for it. By s. 8, where the Secretary of State certifies that in his opinion "any machinery or process or particular description of manual labour used in a factory or workshop is dangerous or injurious to health or dangerous to life or limb," the chief inspector may serve on the occupier of the factory a notice in writing "either proposing such special rules or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable and to meet the necessities of the case"; and if the occupier objects to the rules or requirements, and no modification of them is agreed upon, the matter in difference between himself and the Secretary of State shall be referred to arbitration under the Act, and the rules shall be established, or the requisition shall have effect, as settled by an award on arbitration. That section applies to this case. It is intended to apply to the machinery by which the industrial operation is carried on, as distinguished from that which supplies or conveys the motive power. Nearly all machinery by which industrial operations are carried on is dangerous to the operator, and in many instances—such as that of a circular saw—it is impossible to guard against the danger. The intention of the legislature was to entitle the occupier to have a proper inquiry made before special rules and requirements with respect to such machinery were imposed upon him. Sched. I., cl. 16, supports this view: it provides that the arbitrators may examine the parties and their witnesses on oath, and consult engineers or scientific persons. Sect. 8 was an unnecessary enactment if s. 6 of the Act of 1891 had the effect of causing the provisions of s. 5 of the Act of 1878 to apply to all dangerous machinery in factories.

CAVE J. I am of opinion that the magistrate was mistaken in the view he took, that the machinery referred to in s. 6, sub-s. 2, of the Factory and Workshop Act, 1891, did not include such machinery as that in question here. I think he ought to have inquired whether the part of the machinery at which the

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Cave J.

accident happened was a part of the machinery which was dangerous. The course of legislation on the subject has been this: In 1878 the general Act was passed, which enacted by s. 5, sub-s. 3, that "every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." It is admitted that that section in its original state did not apply to such machinery as this power press. Then there follows s. 6, which gives power to obtain the fencing of other dangerous machinery than that to which s. 5 applies, by means of notice given by the inspector to the occupier of the factory, and by means, if necessary, of an arbitration between them. But in 1891 a further Act was passed, which amended the Act of 1878. By s. 6, sub-s. 2, of the later Act the words "all dangerous parts of the machinery and" are to be inserted before the words "every part" in s. 5, sub-s. 3, of the earlier Act. At the same time s. 6 of the earlier Act is repealed; and it is perfectly obvious that the power of determining what is "dangerous machinery" given by s. 6 was taken away, and the power to say what is or is not dangerous machinery was given to the magistrate, an experienced person whose decision is subject to appeal to quarter sessions, and, if he goes wrong in point of law, to this Court. Those provisions seem to me ample to secure the objects which the the legislature had in view. It is said, however, that we ought to come to a different conclusion because of s. 8 of the Act of 1891, which provides that, where the Secretary of State certifies that in his opinion any machinery or process or particular description of manual labour used in a factory or workshop is dangerous or injurious to health, or dangerous to life or limb, special rules and requirements may be made, after notice served by the inspector upon the occupier of the factory, and, if necessary, after an arbitration. It is said that s. 8 has been substituted for s. 6 of the Act of 1878. I do not think so. Looking at the intention of the legislature as disclosed by the statute, I should be inclined rather to say that the provisions of s. 8 were intended to have relation only to particular dangerous processes or manufactures carried on in some factories; though I do not say that

they may not apply to such a case as the present, if the Secretary of State were to certify. It is not necessary to decide that question. It is only necessary to say that s. 5 of the Act of 1878, as amended by s. 6 of the Act of 1891, enables the matter to be brought immediately before a magistrate in the case of such machinery as this. The case must go back to the magistrate with this intimation of our opinion.

WRIGHT J. I agree. The argument for the respondents really asks us to repeal the enactment of s. 6, sub-s. 2, of the Act of 1891. The words "all dangerous parts of the machinery" are quite general, and I see no reason for putting upon them the limitation which has been suggested. The occupier of a factory has several courses open to him. He may either alter the construction of the machinery, or fence it, or place it where it is not dangerous.

Case sent back accordingly; leave to appeal was refused.

Solicitor for appellant: *The Solicitor of the Treasury.*
Solicitors for respondents: *William Hurd & Son.*

W. A.

THE QUEEN *v.* JUSTICES OF LONDON.

1895
April 1.

Metropolis—Management Acts—Vestry—Compulsory Taking of Land—Assessment of Compensation by Jury—Owner's Costs—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*)—*Metropolis Management Act*, 1862 (25 *& 26 Vict. c.* 102), *s.* 73.

Where land has been taken compulsorily, under Michael Angelo Taylor's Act, by the vestry of a metropolitan parish for the purpose of widening a street, and the owner's compensation has been assessed by a jury, he is not entitled to be paid by the vestry his costs of the trial.

RULE NISI for a mandamus commanding the justices at quarter sessions of the county of London to direct the clerk of the peace of the same county to tax the costs and expenses incurred by the applicant in proceedings to assess compensation in respect of land belonging to him, which had been taken compulsorily by the vestry of the parish of St. Mary, Islington, for the purpose of widening a street.

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The vestry having given notice to the applicant, under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), of their intention to take the land in question for the purpose of widening a street, a jury was duly summoned to assess the compensation to be paid to the applicant.

The case was heard at the quarter sessions for the county of London held in October, 1894, when the jury assessed such compensation at the sum of 75*l*. No offer of compensation by the vestry was brought before the Court at the hearing. Subsequently the applicant's solicitor delivered his bill of costs, amounting to more than 100*l*., to the clerk of the peace for taxation. The clerk of the peace having recommended that the matter should be brought before the justices at quarter sessions in December, 1894, an application on behalf of the applicant was made to the Court of quarter sessions for an order that the clerk of the peace should tax the applicant's costs. The Court of quarter sessions refused to make the order on the ground that they had no jurisdiction, and this rule was thereupon obtained by the applicant.

A. Macmorran, for the vestry, shewed cause against the rule. Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.) gives no right to costs to a person whose land has been compulsorily taken by the vestry for the purpose of widening a street, and who has had his compensation assessed by a jury. The only provision as to costs is that contained in s. 82, by which the vestry are entitled to costs if the compensation assessed does not exceed the amount which has been offered by the vestry.

[He was stopped.]

Bosanquet, *Q.C.*, and *A. P. Poley*, for the applicant, supported the rule. The provisions of Michael Angelo Taylor's Act were extended to the parish of St. Mary, Islington, by s. 73 of the Metropolis Management Act of 1862 (25 & 26 Vict. c. 102), which provides that the powers of improving and regulating streets, and for the suppression of nuisances, contained in Michael Angelo Taylor's Act shall apply "so far as the same is not inconsistent with the said recited Acts and this Act." The recited Acts are the Metropolis Management Acts, 18 & 19 Vict.

c. 120, 19 & 20 Vict. c. 112, and 21 & 22 Vict. c. 104. None of these Acts give vestries power to take land compulsorily for the purpose of widening streets; and the Act of 1862, s. 72, only gives vestries power to widen streets with the consent of the Metropolitan Board of Works, and to take, by agreement or gift, land for that purpose. By s. 96 of 18 & 19 Vict. c. 120, every vestry shall, within their parish or district, execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England was then or thereafter might be invested with or liable to by virtue of his office under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities were not inconsistent with that Act. By the Highway Act of 1835 (5 & 6 Wm. 4, c. 50), s. 82, power is given, upon the order of two justices, to widen highways, and if the surveyor is unable to agree with the owner of the land taken upon the compensation to be paid to him, the same may be assessed by a jury at quarter sessions. By s. 83 the owner is entitled to his costs if the jury give a verdict for more moneys than shall have been offered by the surveyor to the owner before the application to quarter sessions was made. Sect. 112 provides that nothing contained in the Act shall repeal, alter, or interfere with the powers and provisions contained in any Act relating to any particular parish or place for any of the purposes mentioned. The Highway Act has been held to apply throughout the metropolis; but it leaves the application of local Acts in the districts to which they relate untouched: *Back* v. *Holmes*. (1) When, therefore, the provisions of Michael Angelo Taylor's Act were applied to the parish of St. Mary, Islington, by 25 & 26 Vict. c. 102, the only power the vestry had to take compulsorily land for the purpose of widening streets in metropolitan parishes was that given by the Highway Act of 1835, which provided for the payment of the owner's costs, though under 25 & 26 Vict. c. 102, they might take land for that purpose by agreement or gift, with the consent of the Metropolitan Board of Works. It is submitted that in that state of things the provisions of Michael Angelo Taylor's Act, which do not provide for the payment of the owner's costs when his

(1) 56 L. T. (N.S.) 713.

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compensation has been assessed by a jury, are inconsistent with the provisions of 25 & 26 Vict. c. 102, and the Acts therein recited, and do not apply to the parish of St. Mary, Islington. The justices at quarter sessions ought, therefore, to have directed the clerk of the peace to tax the applicant's costs.

CAVE J. It is unfortunate, but there does not appear to be any power to tax the costs of the applicant for a mandamus in this case. The vestry proceeded under Michael Angelo Taylor's Act, which contains no power enabling the person, who has obtained compensation from a jury in respect of the compulsory taking of his land, to get his costs. It has been contended that such a power may be inferred from the provisions of s. 73 of 25 & 26 Vict. c. 102, which, however, is applicable to a wholly different state of things. No authority has been cited in support of that contention. There being no provision entitling the applicant to costs in the statute under which these proceedings were taken, I am of opinion that this rule must be discharged.

WRIGHT J. I concur reluctantly. I think the Act ought to be amended in this and other respects.

Rule discharged.

Solicitor for applicant: *W. Lewis.*
Solicitors for vestry: *Samuel Price & Sons.*

W. A.

MORGAN *v.* JACKSON.

1895
April 26.

Game—Alienation of right to kill Ground Game—Occupier of Land—Contract —Validity—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47), *ss.* 1, 2, 3.

The plaintiff, who was occupier of a farm with the sole right of taking game and rabbits on it, in 1889 agreed in writing to let to the defendant for an annual sum "the sole right of killing all winged game, hares, and rabbits" on the farm:—

Held, that this agreement was not made void by s. 3 of the Ground Game Act, 1880.

APPEAL from a decision of the judge of the Monmouth County Court.

An action was brought in the county court to recover the amount of sums alleged to be due from the defendant to the plaintiff under an agreement.

The following facts were proved or admitted at the trial:—

The plaintiff was occupier of a farm under an agreement which contained no reservation to the landlord of any game or sporting rights. By an agreement in writing made in 1889, the plaintiff agreed to let to the defendant "the sole right of shooting and killing all winged game, hares, and rabbits" on the farm, and to "use his influence and best endeavours to preserve all winged game, hares, and rabbits"; and the defendant agreed to pay to the plaintiff for such right the sum of 15*l.* at the end of each shooting season.

The plaintiff claimed the amount of sums due by way of rent under the agreement of 1889.

The county court judge gave judgment for the defendant, on the ground that the agreement between the plaintiff and the defendant was void under s. 3 of the Ground Game Act, 1880 (43 & 44 Vict. c. 47), so far as it purported to give the defendant the sole right to kill hares and rabbits; that the consideration in respect of which the defendant agreed to pay rent failed to that extent and was illegal by statute, and that as the consideration was inseparable, the agreement was wholly void.

The plaintiff appealed from that judgment.

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Gwynne James, for the appellant. The decision of the learned county court judge was wrong. There is nothing in s. 3 of the Ground Game Act, 1880 (1), to render void such an agreement as this.

[He was stopped.]

Corner, for the respondent. The agreement purports to alienate the sole right to kill game and rabbits; it is, therefore, void under s. 3, which applies to cases coming within s. 2. The undertaking of the occupier to preserve game, including ground game, for the sporting tenant is contrary to the statute.

DAY J. I am of opinion that the judgment appealed from was wrong. The county court judge has construed s. 3 of the Ground Game Act, 1880, as having a much wider operation than it really has. It was passed for the purpose of preventing occupiers and their landlords from combining to defeat the object of the Act, and that object is to keep the ground game at the disposition of the occupier. In the present case the occupier had rights apart from the Act. He came within s. 2, being an occupier of land and entitled otherwise than in pursuance of the Act to kill and take ground game thereon. I can see nothing in s. 2 or s. 3 which prevents him from entering into a contract with another to allow that other to exercise the right which the occupier has. Before the Act came into operation the occupier was undoubtedly entitled to contract with any other

(1) The Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1: "Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land. . . ."

Sect. 2: "Where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by s. 1 of this Act. . . ."

Sect. 3: "Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void."

person that he should kill and take game on the land. Sect. 3 does not at all interfere with that power to contract. In my opinion, it has no bearing whatever upon the agreement made in this case; it only applies to prevent the occupier from surrendering to the landlord the right which is made inalienable by the Act. This appeal must be allowed.

WRIGHT J. I think the agreement must be read with reference to the Act, and effect can be given to all the provisions of the Act consistently with the maintenance of the agreement. It provides that the sporting tenant shall have "the sole right of shooting and killing all winged game, hares, and rabbits." In my opinion, that is not inconsistent with s. 3, because that section is directed only against occupiers of land depriving themselves, in collusion with their landlords, of the right to kill ground game given by the Act. I think the agreement ought to be read as giving the sporting tenant the whole of the right which the occupier had. It is doubtful whether the occupier retained a right to kill ground game himself. I should say that probably he did.

Appeal allowed.
Leave to appeal was refused.

Solicitors for appellant: *J. White & Sons, for Garrold, Hereford.*
Solicitors for respondent: *Saunders, Hawksford & Bennett, for Corner & Co., Hereford.*

W. A.

C. A.
1895
April 8, 9

[IN THE COURT OF APPEAL.]

ANDREWS AND ANOTHER *v.* NOTT BOWER.

Defamation—Libel—Privileged Occasion—Constable—Publication ordered by Justices—Report made for Assistance of Court.

Where the magistrates for a borough, for the purpose of facilitating the business of the general annual licensing meeting, ordered the defendant, who was head constable of the borough, to issue to persons having business before the meeting copies of a report made by him to the magistrates stating the grounds of objections taken to the renewal of licences :—

Held, that publication by him of the report in pursuance of the magistrates' order was upon a privileged occasion, and therefore that, in the absence of actual malice on his part, an action was not maintainable against him in respect of grounds of objection so published, which the plaintiffs alleged to be a libel upon them.

APPLICATION by the plaintiffs for a new trial of an action for libel tried before Lawrance J. with a jury.

The facts, so far as material to this report, were as follows.

The plaintiffs were sisters, named respectively Agnes and Eliza Andrews. The plaintiff Agnes held the licence of, and acted as manager and barmaid at, a public-house in the city of Liverpool. The plaintiff Eliza was also employed there as barmaid. The defendant was the head constable of Liverpool. The statements complained of as libellous were contained in a report made by the defendant in his capacity of head constable with regard to the licensed houses in Liverpool. It appeared that it had been the practice in Liverpool for some years for the head constable, at the request of the city magistrates, to prepare for use at the annual general licensing meeting a report giving various particulars with regard to all the licensed houses in the city.

On June 25, 1894, the defendant wrote to the clerk to the magistrates pointing out that he had not yet received any instructions as to what information the magistrates would require for use at the ensuing licensing sessions, and that, unless he received instructions before the end of the month, it would be difficult, if not impossible, to furnish a report with such details

as had been given two years previously should the magistrates require it. At a special meeting of the magistrates held on June 27 to consider the matter, it was resolved that the watch committee of the city council should be requested to instruct the head constable to revise and correct the schedule of licensed houses, and to report on the use of back doors for trade purposes, and to add any further information he considered desirable. At a meeting of the watch committee of the council held on July 2, at which the defendant was present, it was resolved that the request of the magistrates should be complied with. A report was accordingly prepared by the defendant and printed, in the form of a schedule with columns in which were entered all the licensed houses in the city of Liverpool with various particulars with regard to them respectively, such as the nature of the licence, the names and addresses of the licensee, the proprietor of the business, and the registered owner of the premises, the convictions (if any) during the previous five years for offences against the licensing laws, the position of the doors of the premises, and their sanitary accommodation. The last column was headed "Superintendent's Remarks," and, among other things, it contained, in cases where a notice of objection to the renewal of the licence had been served, a statement of the fact, together with the grounds of objection set forth in the notice.

Acting on information received from constables and others, the defendant on August 9 had served on the plaintiff Agnes Andrews, as licensee of the before-mentioned public-house, a notice that the renewal of the licence would be objected to on the grounds (among others) "(1.) that you permit improper conduct to take place between your barmaids and men upon your licensed premises; (2.) that you are not a fit and proper person to hold a licence."

In the report prepared by the defendant as above mentioned, the grounds stated in the notice of objection to the renewal of the licence for the public-house of which the plaintiff Agnes Andrews was the licensee were set out in the column headed "Superintendent's Remarks." On August 21, at a special meeting of the magistrates for the city of Liverpool held previously to the

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general annual licensing meeting to consider the head constable's report, a resolution was passed to the effect that the report of the head constable should be taken as read, and that he should, so far as he was able, issue copies of the report to any person who might apply for and require the same in order to facilitate his business at the general annual licensing meeting on payment of 10*s.* 6*d.* for each copy. It appeared that copies of the report had been sent to each of the magistrates for the city, and that thirty-six copies had, in pursuance of the last-mentioned resolution, been sold by the defendant to licensed victuallers, brewers, and other persons, or the solicitors of such persons having business at the general annual licensing meeting, 1894. The persons to whom these copies were sold had, before a copy of the report was supplied to them, to sign a declaration that they required it to facilitate their business at the general annual licensing meeting. An application was made at the general annual licensing meeting for the renewal of the licence of the before-mentioned public-house, not by the plaintiff, Agnes Andrews, but by the owner of the premises. The only evidence given in support of the objection to the renewal of the licence was to the effect that on two or three occasions barmaids had been seen with customers in the "snug," which was a compartment partitioned off at the end of the bar, with the door closed. It was not alleged by the solicitor who appeared for the police that there had been any impropriety further than that, but it was contended that permitting that to take place was improper conduct in the management of a public-house. The opposition to the renewal of the licence was ultimately withdrawn on condition that certain structural alterations should be made, and on the undertaking of the owner of the premises that the barmaids should not in future be allowed to drink or sit with customers.

The libel complained of was the publication in the report made by the defendant of the grounds of objection Nos. 1 and 2 as above mentioned, which were alleged in the statement of claim to mean that the plaintiffs were persons of loose and immoral character, and had been guilty of indecent and improper behaviour with men.

The learned judge at the trial held that the publications of

the libel complained of, which had been proved, took place on privileged occasions, and, there being no evidence of actual malice, the action would not lie: and he therefore non-suited the plaintiffs. The plaintiffs moved for a new trial on the ground of misdirection.

Finlay, Q.C., and *W. F. Taylor*, for the plaintiffs. The statements contained in the defendant's report were clearly defamatory; and the publication of them which took place was in excess of any privilege that could possibly exist in the case. In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom the statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of the statement: *Hebditch* v. *MacIlwaine*. (1) The publication of the defendant's report to the magistrates who were about to act at the licensing meeting may have been privileged; but it cannot be that the publication of the statements affecting the plaintiffs to the various other persons not interested in respect of the premises to which these statements related, but who had business at the licensing meeting in respect of other premises, was on a privileged occasion. Such a publication was not in any way necessary for the conduct of the business of the licensing meeting, and could not be authorized by the magistrates. No doubt the defendant is, generally speaking, bound to obey the orders of a Court of general or quarter sessions or the watch committee under s. 7 of 19 & 20 Vict. c. 69, or the lawful orders of magistrates under s. 191 of the Municipal Corporations Act, 1882; but he can only be bound to obey their "lawful orders." The power of the magistrates is a general power to give such orders only as are reasonably necessary and incidental to the discharge of their functions. They cannot be empowered to order the head constable to publish a libel on an occasion which is not privileged; and, if he does so, their order cannot create a privilege. The order to publish this report to persons having business at the licensing meeting was not an order given by the sessions, but by a special meeting of the magistrates. [They

(1) [1894] 2 Q. B. 54.

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cited *Pullman* v. *Hill & Co.* (1); *Boxsius* v. *Goblet Frères* (2); *Searles* v. *Scarlett* (3); *Stockdale* v. *Hansard.* (4)]

Bigham, Q.C., and *Mulholland, Q.C.* (*Horridge*, with them), for the defendant. The publication of the statements complained of was upon a privileged occasion, and did not exceed the limits of the privilege. By 19 & 20 Vict. c. 69, s. 7, constables are to perform, in addition to their ordinary duties, all such duties connected with the police in their respective counties or boroughs as the justices in general or quarter sessions assembled or the watch committees of such respective counties or boroughs from time to time direct and require. By s. 191 of the Municipal Corporations Act, 1882, a borough constable "shall obey all such lawful commands as he receives from any justice having jurisdiction in the borough or in any county in which the constable is called on to act." The report in which the statements complained of were contained was a compilation of various particulars with regard to the different licensed houses in the city of Liverpool, made in pursuance of orders given to the defendant by the watch committee at the request of the magistrates, who came to the conclusion that it would be a convenience for the purpose of the transaction of their business at the licensing sessions, which is a judicial function, that such a report should be made, and that copies of it should be supplied to them and persons having business at the sessions. It is submitted that the public, or, at any rate, all persons having business before the licensing sessions, whether as parties to cases before the Court, or as professional men representing such parties, were interested in the information contained in this report. Every holder of a licence for premises has an interest in knowing what objections are made to the renewal of the licences of other premises in his neighbourhood, because it frequently happens that the renewal of licences is objected to on the ground that there are too many licensed houses in the neighbourhood, and the objections to the licences of other houses may, therefore, affect his own case. Further, it is contended that the publication of the report was privileged as being ordered by the magistrates in the course of

(1) [1891] 1 Q. B. 524.
(2) [1894] 1 Q. B. 842.
(3) [1892] 2 Q. B. 56.
(4) 9 A. & E. 1.

their judicial business as licensing authority for the convenience of the Court and those engaged in the business before it. The report is, in truth, merely a statement with regard to the business that is to be dealt with by the Court. It is an announcement that certain cases will come before the Court, together with particulars shewing the nature of the questions involved in those cases respectively. It is like a calendar of prisoners at assizes or quarter sessions or a cause list. Could a statement in a cause list that an action was brought by A. B. against C. D. for fraudulent representation be made the subject of an action for libel by the latter? It was competent for the magistrates as a Court exercising judicial functions to determine what was the convenient mode of conducting the business before them, and to give orders accordingly. They have determined that it was convenient that copies of this report should be supplied to all persons having business before the Court. It was the defendant's duty under s. 7 of 19 & 20 Vict. c. 69 and s. 191 of the Municipal Corporations Act, 1882, to obey the orders for the drawing up and publication of this report given by the watch committee and the magistrates. [They cited *Allbutt* v. *General Council of Medical Education and Registration.* (1)]

Finlay, Q.C., in reply.

LORD ESHER M.R. In this case the magistrates for Liverpool, or at any rate those of them who were not disqualified, formed the Court which had to deal with the renewal of the licences for premises in that city. Application has to be made to them annually for the renewal of such licences. The case of each licence has to be considered by the magistrates with reference to the whole of the town. The magistrates are, in respect of the very onerous duty so imposed upon them, a Court exercising judicial functions. They have, in the exercise of those functions, to deal with a very large number of cases in a comparatively short space of time; and they have to consider the case of each licence, not only with reference to itself, but with reference to a number of other cases. The magistrates had, after a long experience, come to the conclusion that it would be a great assistance to them

(1) 23 Q. B. D. 400.

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Lord Esher M.R.

in the administration of the law and in the exercise of the onerous and responsible jurisdiction cast upon them, if they had a report compiled containing the information with regard to the various licensed houses in the town which is contained in the report made by the defendant. They therefore suggested to the watch committee that they should direct the head constable to have such a report compiled. At a meeting of the watch committee, at which the defendant was present, they passed a resolution that the suggestion of the magistrates should be acceded to. That resolution, being passed in the defendant's presence, appears to me to be equivalent to an order by the watch committee to him to have this report compiled within the terms of the 7th section of the Act 19 & 20 Vict. c. 69, to which we have been referred. The report has been compiled by the defendant in pursuance of that order. The magistrates then came to the further conclusion that it was for their assistance in exercising their judicial functions that those who would have to come before them for the purpose of taking part in the business of the Court, and assisting at the exercise of those functions, should also have a copy of this report. They therefore passed a resolution directing the head constable to supply copies of the report to those persons having business before the general annual licensing meeting who might apply for copies in order to facilitate their transaction of that business. In issuing copies of the report to persons who were coming before the magistrates for the purpose of taking part in the transaction of the business of the Court, either as counsel, solicitors, or parties to cases within the jurisdiction of which the magistrates had the exercise, I think the head constable was obeying an order which the magistrates had power to give him, and which he was bound to obey. It was an order of a Court given to one of its officers with regard to the mode in which its business should be carried on. I am of opinion that the publication of the report was, under these circumstances, upon a privileged occasion. I do not think there was any evidence of the publication of the report to any persons but those having business before the Court. For these reasons, I think the application must be dismissed.

LOPES L.J. I am of the same opinion. The question raised in this case is somewhat novel, and one of considerable difficulty. It is whether, under the circumstances which existed in this case, the occasion of the publication of the alleged libel was privileged. It appears in substance that the magistrates, for the convenient conduct of the business of the brewster sessions, ordered the report in question to be prepared. So far nobody had any right to complain. They had a perfect right to make that order. When the report was prepared, copies of it were delivered to the magistrates. It has not been seriously suggested that so far there was any transgression of the limits of a privileged occasion. But then it is said that copies of the report were delivered to other persons. I see no evidence that copies of the report were delivered to any persons not having business at the sessions; but it is said that the delivery of copies of the report to other persons having business at the sessions, but who were not interested in the premises to which the statements complained of related, was in excess of the privilege; that that publication was unnecessarily wide, and therefore the privilege was destroyed. The question is a novel one, and I have felt some hesitation with regard to it; but I come to the conclusion that the publication which took place in this case was not in excess of the privilege. This report was, I think, most clearly made and published by direction of a competent authority, namely, the magistrates; and it cannot be denied that it was a report the publication of which was at any rate convenient and desirable for the purpose of the proper and effective discharge of the business of the brewster sessions. The defendant, as far as I can see, did nothing more than what he was ordered to do by a Court of competent authority. I therefore arrive at the conclusion that the occasion was privileged, and that nothing was done by the defendant which can be said to be a violation or abuse of the privilege. It was said in *Stuart* v. *Bell* (1) by Lindley L.J. that "the reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged,

(1) [1891] 2 Q. B. 341, at p. 346.

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Lopes L.J.

and separate them from those which are not." Those words appear to me to be applicable to the present case, because I think it may be justly said that the publication of the report in question, as it was published, was convenient and indeed almost necessary for the purpose of transacting the business of the sessions; and it was ordered, as I have already said, by a competent authority. It seems to me, therefore, that the ruling of the learned judge at the trial, that the publication was upon a privileged occasion, was correct, and that he rightly nonsuited the plaintiffs.

RIGBY L.J. I am of the same opinion. The only question with which we have to deal in this case is whether the publication of the alleged libel took place on a privileged occasion. I should have had some difficulty in coming to the conclusion that the occasion was privileged merely by reason of the interest which any of the persons having business at the brewster sessions had in one or two or three out of the two thousand and odd cases before the sessions. But we have further to consider by what authority the publication was made, and the state of things generally with regard to it. It was undoubtedly made by virtue of a resolution of magistrates who had to conduct the business of the brewster sessions. This was, I am aware, only a resolution of a special meeting of the magistrates; but there can be no doubt, I think, that the whole body of the magistrates acting at the sessions adopted what had been done by the special meeting previously. The question then arises whether it was within their power and duty to make such a provision as they made for the purposes of the transaction of their business at the sessions. I was impressed by the illustration derived from the practice with regard to calendars of prisoners to be tried at assizes and quarter sessions, though at first I felt inclined to doubt whether there might not be in this case an absence of that authority for publication from the Court which clearly exists in the case of such calendars. I think that this case is analogous to that of such a calendar. In the conduct of public business and in the public interest the magistrates directed that, not only they themselves, but also all suitors and professional

men who in any capacity had business before the sessions, and who applied for a copy of this report for the purpose of such business, might be furnished with one. I think that in giving this direction they were acting within their authority. With regard to the technical objection that this direction was not given by the magistrates sitting in sessions, but by a special meeting of magistrates, that seems to be got over by the 191st section of the Municipal Corporations Act, 1882, by which a constable is bound to obey all such lawful commands as he receives from any justice having jurisdiction in the borough, and therefore would be bound to obey the lawful commands of any meeting of justices. It seems to me, therefore, that the magistrates had power to require the head constable, and I am clear that it was brought to his knowledge that they did require him, to issue this report with relation to the proceedings that were to be held at the sessions. On that ground it appears to me that the occasion was privileged.

Application dismissed.

Solicitors for plaintiffs: *Wynne, Holme & Co., for Fisher, Sandys & Co., Liverpool.*

Solicitors for defendant: *F. Venn & Co., for G. J. Atkinson, Town Clerk of Liverpool.*

E. L.

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April 6, 8.

DOLCINI *v.* DOLCINI. CETTA, CLAIMANT.

Bill of Sale—Formalities—Form in Schedule—Address of Grantor—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43).

The address of the grantor of a bill of sale appearing in the body of the bill need not be his actual place of residence or his place of business.

The grantor of a bill of sale carried on business at one address, resided at a second, and was a member of a club at a third, to which last-named address letters might be sent to him with the certainty that they would be received by him; his address given in the body of the bill of sale was that of the club:—

Held, that the bill of sale was not void for deviating from the form in the schedule to the Bills of Sale Act, 1882.

APPEAL from the judge of the Westminster County Court.

The claimant was the holder of a bill of sale given by the execution debtor. The grantor was a member of a club of foreign restaurant employés which met at 24, Gerrard Street, Soho, where letters might be sent to, and received by, him; his place of business was at another address, and his residence at a third. At the trial it was contended that the bill of sale was void, as not containing the address of the grantor. The learned judge found that the address given had been inserted without any intention to mislead, and that no one had been in fact misled, and gave judgment in favour of the claimant. The execution creditor appealed.

Macaskie, for the execution creditor. The bill of sale is not in accordance with the form in the schedule. There is no express authority as to the sufficiency of the description of the grantor's address in the body of a bill of sale, but an address which is neither his residence nor his place of business must be insufficient. It is more important that the address of the grantor should be fully and correctly given than that of the attesting witness; yet in the latter case both the address and description must appear in the attestation clause, and a defect in that respect is not cured by the fact that they appear in the affidavit filed at

the time of registration: *Parsons* v. *Brand.* (1) By implication the same particularity must be required in the case of the grantor. Under s. 10 of the Bills of Sale Act, 1878, the affidavit filed at the time of the registration must contain a description of the residence and occupation of the grantor, and it is just as important in the interest of creditors that that information should appear in the bill of sale as in the affidavit. [He cited *Button* v. *O'Neill* (2); *Hewer* v. *Cox.* (3)]

Duke (*Kerly*, with him), for the claimant, was not called upon.

CAVE J. I am of opinion that this appeal should be dismissed. The point taken is that the bill of sale does not contain a statement of the residence and occupation of the grantor; and in order to sustain that objection it is necessary to shew some statutory provision that a bill of sale must contain those particulars. The only statutory provision as to the form of a bill of sale is that contained in s. 9 of the Bills of Sale Act, 1882, which avoids a bill of sale unless it is made in accordance with the form in the schedule to that Act. On looking at the form, it seems that, although it directs that the address and description of the attesting witness are to be added, there is no such direction as to the address and description of the grantor; the only expression applicable to his address or description is the indefinite expression "A. B. of ——." It is impossible to contend that "of ——" means that a man's residence and description are to be set out. Something, of course, must be inserted; and in the present case the words "24, Gerrard Street, Soho," have been put in, and the learned judge has found that letters might be sent to that address with the certainty of their reaching the grantor, and further that that address was not inserted with the intention of misleading any one, and that it has not had that effect. Considering that the affidavit of execution and attestation, which under s. 10 of the Act of 1878 has to be filed at the time of registration, is obliged to contain (and in the present case does contain) the residence and description of the grantor,

(1) 25 Q. B. D. 110. (2) 4 C. P. D. 354.
(3) 30 L. J. (Q.B.) 73.

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it seems to me impossible to say that this bill of sale is void as not being in accordance with the form in the schedule. The learned county court judge was therefore right; and his decision must be affirmed.

LAWRANCE J. concurred.

Appeal dismissed.
Leave to appeal refused.

Solicitors for execution creditor: *Morris & Rickards.*
Solicitor for claimant: *Francis Miller.*

W. J. B.

1895
April 24.

CARTWRIGHT *v.* REGAN.

Bill of Sale—Validity—Form in Schedule—Covenant to Produce Last Receipts for Rent—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.

A bill of sale contained a covenant by the grantor to produce his last receipts for rent, rates, and taxes—no demand in writing by the grantee being required—and a proviso that the chattels assigned should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—

Held, that the insertion of the covenant did not render the bill of sale void as not in accordance with the form in the schedule to the Act.

APPEAL against a decision of the judge of the Whitechapel County Court.

In an interpleader proceeding to try the right, as between the claimant under a bill of sale of personal chattels given by way of security for the payment of a sum of money and the execution creditor, to goods seized in execution, the bill of sale contained (inter alia) the following covenants and proviso: "And the mortgagor doth also agree with the said mortgagee that he . . . will punctually pay all rent, taxes, rates, and outgoings to become due and payable in respect of the premises on which the said chattels and things, or any of them, are or shall be, and also will produce the last receipts for such rent, taxes, and rates: Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagee

for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882." (1)

The county court judge gave judgment for the claimant, and the execution creditor appealed.

W. H. Stevenson, for the execution creditor. The grantor under his covenant is bound to produce his last receipts for rent, whether the production be demanded in writing or not. Such a covenant is not one "necessary for the maintenance of the security" within the meaning of those words in the form given in the schedule to the Act of 1882, and the insertion of it makes the bill of sale bad under s. 9. The decision in *Barr* v. *Kingsford, Oakley, Claimant* (2), covers this case. There a covenant to produce the grantor's last receipts for rent "on demand" was held to render the bill of sale void as not being in accordance with the form in the schedule.

Clavell Salter, for the claimant. In *Barr* v. *Kingsford, Oakley, Claimant* (2), the bill of sale contained a proviso that if the grantor made default in the performance of any of the covenants the principal money secured and interest should immediately become payable without the necessity for any demand; and it followed that the grantee would on breach of the covenant have power to seize the goods. There is no such proviso in this bill of sale. Without such a proviso, and without giving the grantee any power to seize the goods on breach of the covenant, a mere covenant that the grantor will produce his last receipts for rent does not render the bill of sale void. The covenant may be treated as superfluous.

WRIGHT J. In this case the bill of sale contains a naked covenant that the grantor will produce his last receipts for rent, without saying anything about a demand in writing. It contains also a proviso limiting the grantee's power to seize the

(1) The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes: .... (4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes."

(2) 56 L. T. (N.S.) 861.

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Wright J.

goods comprised in the bill of sale to the cases specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. The covenant, therefore, is of no importance in determining the rights of the parties, and both upon authority and in common sense an immaterial departure from the form given in the schedule does not make the bill of sale void. At first sight the case cited for the execution creditor—*Barr* v. *Kingsford, Oakley, Claimant* (1)—seemed to decide that a covenant to produce the last receipts for rent, without any demand in writing, could not be a covenant necessary for the maintenance of the security, and was not in accordance with the form in the schedule, on the ground that the Act itself only gives power to seize for the non-production of receipts for rent where the production has been demanded in writing. But the latter part of Lord Coleridge C.J.'s judgment shews that the bill of sale in that case gave the grantee power to seize for breach of any of the covenants, and the Court held that, inasmuch as the only power given by the Act was a power to seize after demand in writing, a covenant to produce without demand in writing, for the breach of which covenant the grantee was enabled to seize, made the bill of sale void. Besides this, other objections might be made to the validity of that bill of sale. The covenant to produce receipts for rent without demand in writing, with the proviso that the sum secured and interest should become immediately payable on breach of the covenant, was inconsistent with the provision that the goods should only be liable to seizure for one of the causes specified in s. 7. Further, nothing could be more calculated to deceive an ignorant mortgagor than such a covenant and proviso qualified merely by a reference to the statute. I am of opinion that the judgment appealed from was right, and the appeal should be dismissed.

KENNEDY J. I am of the same opinion. *Barr* v. *Kingsford, Oakley, Claimant* (1), is distinguishable on the grounds which have been stated by my brother Wright. There was an express provision, which is not in the bill of sale before us, that on breach of any of the covenants the whole sum secured and the

(1) 56 L. T. (N.S.) 861.

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Kennedy J.

interest due should become immediately payable. It is true that that was qualified by a provision that the goods were not to be seized for any cause other than those specified in s. 7. I agree that those provisions were inconsistent the one with the other. If the principal and interest are to become immediately payable on the happening of one of the things not specified in s. 7, then it follows, as pointed out by the learned judges in *Barr* v. *Kingsford, Oakley, Claimant* (1), and as appears from the judgment read by Bowen L.J. in *Ex parte Stanford, In re Barber* (2), that the grantee has power to seize the goods. There is, however, no such provision in this bill of sale. The covenant is merely a naked covenant by the grantor to produce his last receipts for rent, and the goods are only made liable to seizure for one of the causes specified in s. 7. I think such a covenant does not make the bill of sale void.

Appeal dismissed.

Solicitor for execution creditor: *F. Deakin.*
Solicitor for claimant: *H. Morris.*

W. A.

KENT COUNTY COUNCIL, APPELLANTS *v.* HUMPHREY, RESPONDENT.

1895

May 2.

Local Government — County Council — Bye-law — Validity — Sale of Coal — Delivery from Vehicle — Requisition to provide and carry Weighing Instrument — Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 28.

By the Weights and Measures Act, 1889, s. 28, local authorities may make bye-laws requiring a weighing instrument to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.

A county council made a bye-law that "Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall reweigh the coal upon being requested to do so."

A coal merchant was summoned for conveying coal for delivery from a

(1) 56 L. T. (N.S.) 861. (2) 17 Q. B. D. 259, at p. 273.

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vehicle to a purchaser without a weighing machine, contrary to the bye-law. He had ordered the carman to leave the scales and weights on the wharf:—

Held, on a case stated by justices, that the provision in the bye-law, requiring that a weighing machine should be provided and carried, was warranted by the terms of the statute, and was valid, and there ought to be a conviction.

CASE stated by justices.

An information was laid against the respondent, a coal merchant, for conveying coal for delivery from a vehicle to a purchaser without a correct and stamped weighing machine of the form approved by the respondents, the Kent County Council, contrary to a bye-law made by the respondents under s. 28 of the Weights and Measures Act, 1889. (1) The bye-law in question was as follows:—

"Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall reweigh the coal, upon being requested to do so by the purchaser, or any one on his behalf, or by any inspector of weights and measures. Any person failing to observe this bye-law is liable to a penalty of 5*l.*"

A form of weighing machine had been approved by the appellants under this bye-law. On December 1, 1894, a carman in the employment of the respondent took half a ton of coal in a waggon for delivery to a purchaser at Erith. The carman, when he delivered the coal to the purchaser, had no scales or weights with him, the respondent having ordered him to leave them on the wharf. It was contended before the justices that the bye-law was ultra vires and invalid, because it required that the carman should reweigh the coal upon being requested to

(1) 52 & 53 Vict. c. 21, s. 28, sub-s. 1: "Any local authority may, from time to time, make, revoke, and alter bye-laws—

"(*a*) regulating, for the purposes of this Act, the sale of coal in quantities not exceeding two hundredweight; and

"(*b*) requiring, either generally or in specified classes of cases, a weighing instrument, of a form approved by the local authority, to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.

. . . . and may by such bye-laws impose fines, recoverable summarily, and not exceeding in each case 5*l.*, for the breach of any such bye-law."

do so. The justices adopted this view, and dismissed the information.

Hohler, for the appellants. The bye-law is valid, and the justices ought to have convicted the respondent. The provision in the statute, which authorizes a bye-law requiring a weighing instrument to be carried, impliedly authorizes a bye-law requiring such instrument to be used. The intention of the legislature that, in all cases of sales of coal, the coal shall be weighed if required, is shewn by s. 25 of the same Act, by which a weighing instrument is to be kept in the place where coal is sold by retail, and the coal is to be weighed if required. In any case the 1st clause in the bye-law, requiring a weighing instrument to be carried, is authorized by the express words of s. 28, and it is under this clause that the charge was made.

The respondent did not appear.

CHARLES J. I am of opinion that our judgment ought to be in favour of the appellants, on the ground that the justices have not come to a correct decision in holding this bye-law to be invalid. Sect. 28, sub-s. 1 (*b*), of the Weights and Measures Act, 1889, gives power to make bye-laws requiring a weighing instrument to be carried with any vehicle in which coal is carried for sale or delivery. Acting under this section the appellants, the county council of Kent, have made a bye-law which provides that "Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council." That part of the bye-law is clearly valid, having regard to the provisions of s. 28 to which I have called attention. By the latter part of the bye-law it is provided that "such person shall reweigh the coal, upon being requested to do so by the purchaser, or any one on his behalf, or by any inspector of weights and measures," and this clause was relied on before the justices on behalf of the respondent as being ultra vires and rendering the bye-law invalid. The expression "to reweigh the coal" is perhaps a somewhat

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inaccurate phrase, but it is not necessary for us to give any opinion as to whether the latter clause in the bye-law may or may not be ultra vires, because the earlier clause, on which the charge against the respondent was founded, is clearly good. The case must be remitted to the justices with this intimation of our opinion.

WRIGHT J. I am of the same opinion. The statute authorizes the making of a bye-law requiring a weighing instrument to be carried, and the respondent is summoned under the bye-law for not causing one to be carried. It may well be that the provision authorizing the making of a bye-law directing that an instrument shall be carried has the effect of authorizing a bye-law directing that such instrument shall be used. It is unnecessary, however, for the purposes of our decision, to say more than that the first part of the bye-law is valid.

Case remitted.

Solicitors for appellants: *Palmer & Bull.*

P. B. H.

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April 3.

HILL, APPELLANT; HAIR, RESPONDENT.

Local Government—Sewers—"Single Private Drain"—Drainage of two or more Premises—Local Act—Public Health Acts, 1848 (11 & 12 *Vict.* c. 63); 1875 (38 & 39 *Vict.* c. 55), ss. 4, 13, 15, 41; 1890 (53 & 54 *Vict.* c. 59), s. 19.

By a system of drainage established before 1848, a single brick drain on the respondent's premises conveyed the drainage of his house, and of other houses belonging to different owners, into an adjacent ditch. In 1853 the local authority of the district substituted for the ditch a public sewer, and the brick drain was connected with it. In 1887 a local Act was passed, which provided that where two or more houses or premises were connected with a single private drain which conveyed their sewage into a public sewer, the local authority should have all the powers conferred by s. 41 of the Public Health Act, 1875. The local authority had adopted the Public Health Acts Amendment Act, 1890, s. 19, which contains provisions with respect to "single private drains" similar to those in the local Act:—

Held, that the brick drain was not a "single private drain" within the meaning of the local Act or of s. 19 of the Public Health Act of 1890, because on the passing of the Public Health Act, 1848, such drain became, and had

ever since been, a sewer vested in the local authority and repairable by them, and therefore that they were not entitled to exercise against the respondent the powers conferred upon them by s. 41 of the Public Health Act, 1875.

Self v. *Hove Commissioners* (ante, p. 685) discussed.

CASE stated under the Summary Jurisdiction Acts by two justices of the city of Carlisle.

The respondent, who was the owner and occupier of a house and premises in Carlisle, was served with a notice from the mayor, aldermen, and citizens of the city, being the urban sanitary authority of the district, requiring him, within seven days from the date of such notice, to abate a nuisance arising from the defective condition and construction of a brick drain on his premises, and for that purpose to execute certain specified work.

Subsequently the respondent was summoned to appear before the justices to answer an information and complaint preferred by the appellant, who was the inspector of nuisances for the local authority, alleging that the respondent had, contrary to the provisions of the Carlisle Corporation Act, 1887 (50 & 51 Vict. c. xix.), and the Public Health Act, 1875 (38 & 39 Vict. c. 55), failed and neglected to comply with the terms of that notice.

Upon the hearing of the complaint the following material facts were proved or admitted :—

The respondent's house and premises, together with other adjoining premises (altogether belonging to six owners), were old residential premises built before the passing of the Public Health Act, 1848 (11 & 12 Vict. c. 63). They were drained by a combined system of drainage, constructed upon private property, which conveyed the drainage into an adjacent ditch. In or about 1853 a public sewer was laid down in place of the ditch by the urban sanitary authority in pursuance of the powers contained in the Public Health Act, 1848, and for the purpose of draining their district as part of a general system of sewerage for the city, and the drainage of the respondent's and the other adjoining premises was connected with that sewer. The system of drainage of the respondent's and the other adjoining premises was never in any way approved or adopted

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by the sanitary authority. The city surveyor in his evidence stated that they had always regarded it as private drainage, and dealt with it as such without in any way accepting any responsibility for it. The brick drain or sewer in question on the respondent's premises formed part of the system of drainage of his and the other adjoining premises, and carried the sewage thereof into the public sewer. It was proved that notice to abate the nuisance had been duly given by the appellant to the respondent, and that the latter had failed to comply with such notice. The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 9), had been adopted by the local authority prior to the commencement of the proceedings taken against the respondent.

The justices were of opinion that the brick drain or sewer on the respondent's premises was a sewer vested in the local authority, and not a "single private drain" within the meaning of s. 134 of the Carlisle Corporation Act, 1887 (1), and that it was not the duty of the respondent to abate the nuisance. They therefore dismissed the information and complaint.

The question for the opinion of the Court was whether, under

(1) The Carlisle Corporation Act, 1887 (50 & 51 Vict. c. xix.), s. 134: "In cases where two or more houses or premises are connected with a single private drain which conveys their sewage into a public sewer, the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41, provides that, on the written application of any person to a local authority, stating that any drain on or belonging to premises within their district is a nuisance or injurious to health, the local authority may empower their surveyor or inspector of nuisances to enter such premises and examine such drain; and if it appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith, or within a reasonable time therein specified, to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty, and the local authority may, if they think fit, do the work themselves, and recover in a summary manner the expenses incurred by them in so doing.

Sect. 4: "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. 'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies. . . ."

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the circumstances set forth in the case, the local authority were entitled to exercise, with respect to the brick drain or sewer in question, the powers conferred by s. 41 of the Public Health Act, 1875.

Channell, Q.C. (*A. Macmorran* with him), for the appellant. This was a "single private drain" carrying the drainage of two or more houses into a public sewer, within the meaning of the Carlisle Corporation Act, 1887, s. 134, and the local authority had, therefore, power to proceed against the owner under s. 41 of the Public Health Act, 1875. Such a provision as that in s. 134 of the Carlisle Act has commonly been put in local acts, and until the decision in *Travis* v. *Uttley* (1) drains conveying the drainage of two or more houses into a public sewer were commonly treated as private drains. The Public Health Acts Amendment Act, 1890, s. 19 (2) (which has been adopted by the local authority at Carlisle), was intended to confirm the practice in that respect, and to remove any difficulty where the houses belonged to different owners. The judgments in *Self* v. *Hove Commissioners* (3) shew that in the opinion of the Court such a drain as the brick drain in question in this case would be a private drain.

Poland, Q.C. (*Alexander Glen* with him for the respondent). The justices' decision was right. The brick drain or sewer was made before the passing of the Public Health Act, 1848, and was a "sewer" within the definition of that word in s. 2. By s. 43 of the Act of 1848, "all sewers, whether existing at the time when this Act is applied, or made at any time thereafter,

(1) [1894] 1 Q. B. 233.

(2) The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19:—

"(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875, ... and the local authority may recover any expenses incurred by them in executing any works under the powers conferred upon them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction."

"(3). For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

(3) Ante, p. 685.

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(except sewers made by any person or persons for his or their own profit or for the profit of proprietors or shareholders . . .) shall vest in, belong to, and be entirely under the management and control of the local board of health." By s. 45 the duty of repairing sewers vested in them under the Act, and of providing such sewers as might be necessary for effectually draining their district, was imposed upon the local authority. This brick drain or sewer was, therefore, a sewer vested in the local authority when the Public Health Act, 1875, which repealed the Act of 1848, was passed, and it has continued a sewer vested in and repairable by them down to the present time. The definition of "drain" and "sewer" in the Act of 1848 is repeated in the Act of 1875, and ss. 13 and 15 contain substantially the same provisions as ss. 43 and 45 of the earlier Act. (1)

The provisions of the Carlisle Corporation Act, s. 134, and the Public Health Acts Amendment Act, 1890, s. 19, with respect to private drains have, therefore, no application here. In *Travis* v. *Uttley* (2) the Court did no more than follow previous decisions which established that local authorities had an absolute property in sewers which had become vested in them: *Bonella* v. *Twickenham Local Board of Health* (3); *Acton Local Board* v. *Batten* (4); *Ferrand* v. *Hallas Land and Building Co.* (5) The only exception is where sewers are made for profit, as in *Minehead Local Board* v. *Luttrell.* (6) The case of *Bateman* v. *Poplar District Board of Works* (No. 2) (7) shews how strictly the Courts have adhered to the statutory words in dealing with these matters.

[He was stopped.]

Channell, Q.C., replied.

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto, except (1.) sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . shall vest in and be under the control of such local authority."

Sect. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

(2) [1894] 1 Q. B. 233.

(3) 20 Q. B. D. 63.

(4) 28 Ch. D. 283.

(5) [1893] 2 Q. B. 135.

(6) [1894] 2 Ch. 178.

(7) 37 Ch. D. 272.

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CAVE J. I am of opinion that the magistrates were right in dismissing the complaint. The authorities cited by counsel for the respondent shew what was the true construction of the Public Health Act, 1848, and shew that, when that Act was passed, all existing sewers thereupon became vested in the local authority. The contention made on behalf of the appellant really is that the local Act has impliedly repealed the general provisions common to the Acts of 1848 and 1875, and that the sewer in question in this case must be taken to have been divested of its public character, and to have been turned into a private drain. There is no warrant whatever for that contention. Sect. 134 of the local Act applies to what were private drains at the time it was passed, and to those drains only. The only difficulty in the matter has been caused by the case of *Self* v. *Hove Commissioners* (1); and I was for some time staggered by the observations of Wills J. in his judgment in that case. But those observations must be taken as applying to the particular facts of the case which was before him; and in the *Law Journal* report (2), which has been referred to, I find in the statement of the facts this passage: "The plaintiff was owner of No. 1, Ivy Place, Hove, and a Miss Viney was owner of No. 2, Ivy Place. Both houses were semi-detached, enclosed by one outer wall and within one curtilage." If both houses were within one curtilage, it follows that the drain was a "drain" and not a "sewer" within the meaning of the definition in s. 4 of the Public Health Act, 1875.

[*Channell, Q.C.*, who was counsel for the respondent in *Self* v. *Hove Commissioners* (1), said that in that case the houses were not within the same curtilage.]

If they were not, I confess I am unable to understand the observations of Wills J. In any view, however, *Self* v. *Hove Commissioners* (1) is not an authority which binds us here. It follows from the provisions of the Public Health Act, 1875, that drains or sewers used for draining premises within the same curtilage may be private drains, notwithstanding that they are used for the drainage of more than one building, and it also follows that there may be sewers which, because they are made for profit, do not vest in the local authority. That may explain

(1) Ante, p. 685. (2) 64 L. J. (Q.B.) 217, at p. 218.

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why s. 134 of the local Act and s. 19 of the Public Health Acts Amendment Act, 1890, came to be passed. Our decision in this case does not in any way interfere with the provisions of those acts. I am of opinion that our judgment should be for the respondent.

LAWRANCE J. I agree.

Judgment for the respondent.

Solicitors for appellant: *Mellor, Smith & May, for Collingwood, Carlisle.*

Solicitors for respondent: *Indermaur & Brown, for Blackburn & Main, Carlisle.*

W. A.

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May 6.

BIRD *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

Local Government—Nuisance—Offensive Trade—Notice to Abate—Condition Precedent to Complaint—Public Health (London) Act, 1891 (54 & 55 *Vict.* c. 76), *ss.* 2, 4, 21.

Sect. 4 of the Public Health (London) Act, 1891, which provides that the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, shall serve a notice on the person responsible for the nuisance requiring him to abate it, applies only to the classes of nuisances enumerated in s. 2, and not to the nuisances arising from offensive trades dealt with by s. 21, and the service of such a notice is not a condition precedent to the jurisdiction of the magistrate to hear a complaint under the latter section.

CASE stated by a metropolitan police magistrate.

The appellant was the occupier of certain premises in Wood Lane, Hammersmith, in the county of London, which were used by him in his business as a brick-burner. On October 20, 1893, the medical officer of health for the parish of St. Mary Abbotts, Kensington, certified to the vestry that the premises so used by the appellant for the purpose of brick-burning caused effluvia, and were a nuisance and injurious and dangerous to the health of some of the inhabitants of the district of Kensington. The district of Hammersmith, within which the premises were situate, immediately adjoins that of Kensington. On December 7, 1893, the appellant was summoned under s. 21 of the Public Health

(London) Act, 1891. (1) No notice under s. 4 of the said Act requiring the appellant to abate the nuisance was ever served upon him. At the hearing objection was taken that service of such a notice by the sanitary authority was a condition precedent to the magistrate's jurisdiction to entertain a complaint for a nuisance under that Act.

The magistrate overruled the objection, and on December 1, 1894, convicted the appellant subject to a case for the opinion of the Court.

Lawson Walton, Q.C., and *Freeman*, for the appellant. The magistrate had no jurisdiction. The language of s. 4 is perfectly general. It applies to all nuisances liable to be dealt with summarily under the Act, as well those dealt with by s. 21 as those specifically mentioned in s. 2. Whenever the sanitary

(1) By s. 2, sub-s. 1, of the Public Health (London) Act, 1891, "For the purposes of this Act" (certain specified nuisances) "shall be nuisances liable to be dealt with summarily under this Act."

By s. 4, sub-s. 1, "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act . . . the nuisance arises or continues . . . requiring him to abate the same within the time specified in the notice."

Sub-s. 4: "Where a notice has been served on a person under this section, and either

"(*a*) the nuisance arose from the wilful act or default of the said person; or

"(*b*) such person makes default in complying with any of the requisitions of the notice within the time specified,

he shall be liable to a fine not exceeding ten pounds for each offence."

By s. 21, sub-s. 1, "Where any manufactory building or premises used for any trade business process or manufacture causing effluvia is certified to the sanitary authority by their medical officer of health or by any two legally qualified medical practitioners or by any ten inhabitants of the district of such authority to be a nuisance or injurious or dangerous to the health of any of the inhabitants of the district, such authority shall make a complaint, and if it appears to the petty sessional Court hearing the complaint that the trade, &c., is a nuisance, &c. . . . the person so offending . . . shall be liable to a fine not exceeding fifty pounds."

Sub-s. 2: "Provided that the Court may suspend its final determination on condition that the person complained of undertakes to adopt within a reasonable time such means as the Court may deem practicable, and order to be carried into effect, for abating the nuisance or mitigating or preventing the injurious effects of the effluvia."

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authority proceed summarily under the Act they are bound first to give a notice to abate, even though the premises on which the nuisance exists are outside their district, for, by s. 14, sub-s. 1, they are in such cases authorized to take the same proceedings "with the same incidents and consequences" as if the nuisance occurred within their district. Those words seem to include the obligation to give notice to abate.

Channell, Q.C., and *Bartley Denniss*, for the respondents, were not called upon.

LORD RUSSELL of KILLOWEN C.J. I think the decision of the magistrate was right, though the matter cannot be said to be entirely free from difficulty. No doubt there is no reason in good sense why a notice to abate should not have been required as a condition precedent to liability in the case of nuisances under s. 21 just as much as in the case of nuisances under s. 2. But the question is whether the legislature has made it so. I think it has not. I am of opinion that s. 4 must, in spite of its apparently general language, be read as limited in its operation to the nuisances set out in s. 2. There are marked differences between the procedure under s. 4 and that under s. 21. Under the former the sanitary authority is compellable to take proceedings only "if satisfied of the existence of a nuisance;" whereas under the latter it is obligatory upon them to do so upon the mere receipt of the certificate of their medical officer, or of the other persons specified in the section. When once the nuisance has been certified to them they have no option but to proceed against the offender. Again, the penalties under the two sections are different. The offence of non-compliance with a notice under s. 4 is punishable with a fine not exceeding 10*l.*; whereas the commission of a nuisance under s. 21 is punishable with a fine not exceeding 50*l.* And, further, it is to be observed that the absence of provisions for a notice in s. 21 does not seriously prejudice a defendant to a complaint under that section, for it is expressly provided in sub-s. 2 that the Court may suspend its final determination in order to give the defendant an opportunity of abating the nuisance, and the Court would obviously take the absence of previous notice into consideration

in determining the question of the imposition of a fine. The appeal must be dismissed.

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CHARLES J. concurred.

Appeal dismissed.

Solicitors for appellant: *Shepheards & Bird.*
Solicitors for respondents: *Pontifex, Hewitt & Pitt.*

J. F. C.

LAVY AND ANOTHER *v.* LONDON COUNTY COUNCIL.

1895
May 1.

Metropolis—Management Acts—General Line of Buildings—What amounts to a "Building Structure or Erection"—Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

The question whether a wall is a "building structure or erection" within the meaning of s. 75 of the Metropolis Local Management Act, 1862, depends upon the height of the wall and the purpose for which it was built.

The forecourt of a house in a street in the metropolis had for many years been bounded on the side next the street by a dwarf wall between two and three feet high. The owner of the premises pulled down the dwarf wall and built on its site a wall eleven feet high, which was intended to be used for the purpose of exhibiting advertisements on it, but was also intended to serve as a boundary wall to the forecourt. The new wall was beyond the general line of buildings in the street, and was erected without the consent of the London County Council:—

Held, that the original dwarf wall was not a "building structure or erection" within the meaning of s. 75, and that so long as it existed the site on which it stood was to be regarded as vacant land for the purposes of the section; but that the substituted wall was a "building structure or erection" within the meaning of the section, and that there was consequently jurisdiction to order its demolition.

CASE stated by a metropolitan police magistrate.

The appellants were the owners of a dwelling-house and premises in the metropolis, situate at the corner of City Road and Duncan Terrace. The house stood back about thirty-eight feet from the footway of City Road, and the space between the house and the footway was a forecourt, which for many years prior to 1894 had been bounded on the sides towards City Road and Duncan Terrace by a dwarf brick wall two or three feet in height and nine inches in thickness above the footings, surmounted by a stone coping, and upon the coping were iron

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railings five feet six inches in height. In May, 1894, the appellants removed the dwarf wall to its footings and erected upon the footings a wall eleven feet high strengthened by piers. The said wall was fourteen inches thick, except at the piers, where it was eighteen inches thick. The wall was erected as an advertising station, but it was also intended to serve as a boundary wall to the forecourt. Forecourt walls are rarely of greater thickness than nine inches. The whole of the wall was in front of the general line of buildings in City Road, as certified by the superintending architect, and was erected without the consent of the respondents. The appellants were summoned for having unlawfully erected a structure beyond the general line of buildings without the consent of the London County Council, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862. The magistrate held that, so far as it was a question of fact, the new wall so built by the appellants was a structure within the meaning of the section, and ordered its demolition, subject to a case for the opinion of the Court.

Dickens, Q.C., and *R. C. Glen*, for the appellants. The wall in question was not a building structure or erection within s. 75. This necessarily follows from the decision of the Court of Appeal in *Wendon* v. *London County Council.* (1) There a builder having carried up the outside wall of a new house to a height of twelve feet from the ground suspended his building operation, and the Court held that the wall in its unfinished state was not a building structure or erection. Lopes L.J. there suggested that a mere wall, however high, and whether intended ultimately to form part of a house or not, could not be a building structure or erection. But if the appellants are wrong on that point, and if this wall was a building, &c., then the dwarf wall for which it was substituted must equally have been a building, &c. And if so, then the case is not within the section, for it was decided in *Lord Auckland* v. *Westminster Board of Works* (2) that s. 75 applied only to buildings erected upon vacant land, and not to buildings erected in substitution for old ones which had been pulled down.

(1) [1894] 1 Q. B. 812. (2) Law Rep. 7 Ch. 597.

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Channell, Q.C., and *Daldy*, for the respondents. Whether a wall is a building or not is a question of degree. Moreover, here the wall was built for purposes of advertisement, and not merely as a bonâ fide boundary wall—a fact which has a very material bearing upon the question whether it comes within the section: *Ellis* v. *Plumstead Board of Works*. (1)

DAY J. In my opinion, the magistrate's decision was clearly right, and must be affirmed.

WRIGHT J. I am of the same opinion. The question here is whether this wall which the magistrate has ordered to be demolished was a "building structure or erection" within s. 75 of the Metropolis Local Management Act, 1862. In the first place, I think that, while the wall remained a mere dwarf boundary wall of two or three feet high, it was not a building structure or erection within the meaning of the section, and, that being so, the site on which it stood was vacant land, and consequently the case of *Lord Auckland* v. *Westminster Board of Works* (2) does not assist the appellants. But then it is said that *Wendon* v. *London County Council* (3) is in their favour, in which case it is said to have been held that a wall twelve feet high was not a "building structure or erection" within the section. In my opinion, the ground of the Court's decision in that case was not that such a wall could not be a "building structure or erection," but that if it was intended ultimately to form part of a house, the land on which it stood ought to be regarded as vacant. There are, no doubt, certain expressions in the judgment of Lopes L.J. which seem at first sight to suggest that a mere wall, even though twelve feet high, could not be regarded as a "building structure or erection." But I do not think that he intended to differ from the rest of the Court. Then, if neither of those cases support the appellants' contention, it must be regarded, as indeed was said by the Court of Appeal in *Wendon's Case* (3), as a question of fact whether this wall was a "building structure or erection" or not. The magistrate has found as a fact that it was, and I cannot

(1) 68 L. T. (N.S.) 291. (2) Law Rep. 7 Ch. 597.
(3) [1894] 1 Q. B. 812.

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see that his finding is so unreasonable as to justify our interfering with it. It is a question of degree. Suppose the wall had been twenty feet or thirty feet high, no one would have contended that it was not within the section. Moreover, in the present case, the magistrate finds that the wall was intended to be used for purposes of advertisement, as well as for a boundary wall, and his decision consequently receives strong support from the case of *Ellis* v. *Plumstead Board of Works* (1), where a distinction is drawn between an ordinary boundary wall and a structure which is intended to be used for other purposes than those of a mere boundary wall. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Morgan & Upjohn.*
Solicitor for respondents: *Blaxland.*

J. F. C.

Considered. HARDING *v.* PRICE. [1948] 1 K. B. 695 *Applied.* REYNOLDS *v.* G. H. AUSTIN & SONS, LTD. [1951] 1 All E.R. 606.

1895

April 25.

SHERRAS *v.* DE RUTZEN.

Licensing Acts—Supplying Liquor to a Constable on Duty—Knowledge of Licensed Victualler—Mens rea—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 16, *sub-s.* 2.

Sect. 16, sub-s. 2, of the Licensing Act, 1872, which prohibits a licensed victualler from supplying liquor to a police constable while on duty, does not apply where the licensed victualler bonâ fide believes that the police constable is off duty.

CASE stated by the chairman of quarter sessions for the county of London.

The appellant was the licensee of a public-house, and was convicted before a metropolitan police magistrate under s. 16, sub-s. 2, of the Licensing Act, 1872 (2), for having unlawfully

(1) 68 L. T. (N.S.) 291.

(2) By the Licensing Act, 1872, (35 & 36 Vict. c. 94), s. 16, "If any licensed person

"(1.) Knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for such constable being on duty . . . or

"(2.) Supplies any liquor or refreshment whether by way of gift or sale to any constable on duty unless by authority of some superior officer of such constable, or

"(3.) Bribes or attempts to bribe any constable, . . .

he shall be liable to a penalty . . ."

supplied liquor to a police constable on duty without having the authority of a superior officer of such constable for so doing.

It appeared that the appellant's public-house was situated nearly opposite a police-station, and was much frequented by the police when off duty, and that on July 16, 1894, at about 4.40, the police constable in question, being then on duty, entered the appellant's house and was served with liquor by the appellant's daughter in his presence. Prior to entering the house the police constable had removed his armlet, and it was admitted that if a police constable is not wearing his armlet that is an indication that he is off duty. The armlet is removed at the police-station when a constable is dismissed, and a publican seeing the armlet off would naturally think the police constable off duty. The police constable was in the habit of using the appellant's house, and was well known as a customer to the appellant and his daughter. Neither the appellant nor his daughter made any inquiry of the police constable as to whether he was or was not on duty, but they took it for granted that he was off duty in consequence of his armlet being off, and served him with liquor under that belief. The appellant and his daughter were in the habit of serving a number of police constables in uniform with their armlets off each day, and the question whether they were or were not on duty was never asked when the armlet was seen to be off.

The appellant appealed to quarter sessions against the conviction, contending that in order to constitute an offence under s. 16, sub-s. 2, of the Licensing Act, 1872, there must be shewn to be either knowledge that the police constable was on duty, or an intentional abstention from ascertaining whether he was on duty or not. The Court of quarter sessions, however, upheld the conviction, considering that knowledge that the police constable, when served with liquor, was on duty, was not an essential ingredient of the offence; but stated this case for the opinion of the Court.

Poland, Q.C., and *Paul Taylor*, for the appellant. The conviction was wrong. An honest and reasonable belief in the existence of circumstances which, if true, would make the act an

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innocent act, has always been held to be a good defence. It never could have been intended that a publican serving a police constable with liquor should be liable to a penalty if the constable was in fact on duty, although he had taken every means of concealing this fact from the publican. It is true that in *Cundy* v. *Le Cocq* (1) it was held that knowledge that the person served was drunk was not necessary to constitute an offence under s. 13; but in such a case a publican must be taken to know whether a person is drunk or not. *Mullins* v. *Collins* (2) is in the appellant's favour, as it was there pointed out that the decision would have been different had the servant not known that the constable was on duty.

Macmorran, in support of the conviction. Sect. 16, sub-s. 2, contains an absolute prohibition against serving a police constable while on duty, just as s. 13, as was held in *Cundy* v. *Le Cocq* (1), contains an absolute prohibition against serving a person who is drunk, and in neither case is the knowledge of the condition of the person served an element in the offence.

The word "knowingly" which is inserted in s. 16, sub-s. 1, is deliberately omitted in sub-s. 2, and it was intended by the legislature that a publican serving a police constable should do so at his own risk.

The appellant ought, at any rate, to have made inquiries as to whether the constable was on duty or not, and ought not to have been content with the mere absence of the armlet.

DAY J. I am clearly of opinion that this conviction ought to be quashed. This police constable comes into the appellant's house without his armlet, and with every appearance of being off duty. The house was in the immediate neighbourhood of the police-station, and the appellant believed, and he had very natural grounds for believing, that the constable was off duty. In that belief he accordingly served him with liquor. As a matter of fact, the constable was on duty; but does that fact make the innocent act of the appellant an offence? I do not think it does. He had no intention to do a wrongful act; he acted in the bonâ fide belief that the constable was off duty. It

(1) 13 Q. B. D. 207. (2) Law Rep. 9 Q. B. 292.

seems to me that the contention that he committed an offence is utterly erroneous. An argument has been based on the appearance of the word "knowingly" in sub-s. 1 of s. 16, and its omission in sub-s. 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word "knowingly" in the one sub-section and its omission in the other.

It appears to me that it would be straining the law to say that this publican, acting as he did in the bonâ fide belief that the constable was off duty, and having reasonable grounds for that belief, was nevertheless guilty of an offence against the section, for which he was liable both to a penalty and to have his licence indorsed.

WRIGHT J. I am of the same opinion. There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: *Nichols* v. *Hall.* (1) One of the most remarkable exceptions was in the case of bigamy. It was held by all the judges, on the statute 1 Jac. 1, c. 11, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: *Lolley's Case.* (2) Another exception, apparently grounded on the language of a statute, is *Prince's Case* (3), where it was held by fifteen judges against one that a man was guilty of abduction of a girl under sixteen, although he believed, in good faith and on reasonable grounds, that she was over that age. Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to

(1) Law Rep. 8 C. P. 322. (2) R. & R. 237.
(3) Law Rep. 2 C. C. 154.

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Wright J.

three. One is a class of acts which, in the language of Lush J. in *Davies* v. *Harvey* (1), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, e.g., *Attorney General* v. *Lockwood* (2), where the innocent possession of liquorice by a beer retailer was held an offence. So under the Adulteration Acts, *Reg.* v. *Woodrow* (3) as to innocent possession of adulterated tobacco; *Fitzpatrick* v. *Kelly* (4) and *Roberts* v. *Egerton* (5) as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier: *Rex* v. *Marsh.* (6) So as to the liability of a guardian of the poor, whose partner, unknown to him, supplied goods for the poor: *Davies* v. *Harvey.* (1) To the same head may be referred *Reg.* v. *Bishop* (7), where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances: *Reg.* v. *Stephens* (8) where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in *Rex* v. *Medley* (9) and *Barnes* v. *Akroyd.* (10) Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per Williams and Willes JJ. in *Morden* v. *Porter* (11), as to unintentional trespass in pursuit of game; *Lee* v. *Simpson* (12), as to unconscious dramatic piracy; and *Hargreaves* v. *Diddams* (13), as to a bonâ fide belief in a legally impossible right to fish. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. It is plain

(1) Law Rep. 9 Q. B. 433.
(2) 9 M. & W. 378.
(3) 15 M. & W. 404.
(4) Law Rep. 8 Q. B. 337.
(5) Law Rep. 9 Q. B. 494.
(6) 2 B. & C. 717.
(7) 5 Q. B. D. 259.
(8) Law Rep. 1 Q. B. 702.
(9) 6 C. & P. 292.
(10) Law Rep. 7 Q. B. 474.
(11) 7 C. B. (N.S.) 641; 29 L. J. (M.C.) 213.
(12) 3 C. B. 871.
(13) Law Rep. 10 Q. B. 582.

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that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16, sub-s. 2, since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house. I am, therefore, of opinion that this conviction ought to be quashed.

Conviction quashed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitor for respondent: *The Solicitor to the Treasury.*

A. P. P. K.

IN RE HEDLEY. EX PARTE BOARD OF TRADE.

1895
April 23.

Bankruptcy—Refusal of Discharge—Felony connected with the Bankruptcy—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8.

Where a person embezzles money of his employer and subsequently becomes bankrupt, the mere fact that the employer proves in the bankruptcy for the amount so embezzled does not cause the offence to be "a felony connected with the bankruptcy" within the meaning of s. 8 of the Bankruptcy Act, 1890.

APPEAL from the county court of Northumberland holden at Newcastle.

The debtor Thomas Hedley commenced business in March, 1891, as a house and estate agent. He was also at that time secretary of a building society called the Eldon Building Society. He embarked upon certain building speculations which were unsuccessful, and on October 15, 1891, a receiving order was made against him, and on November 9 he was adjudicated a bankrupt.

At the date of the receiving order the debtor was undergoing a term of imprisonment for felony, he having been convicted of embezzling a sum of 2*l.* belonging to the Eldon Building Society, which money he had received in his capacity as secretary. He had in fact misappropriated in his capacity as such secretary sums of money amounting altogether to 437*l.* 4*s.* 9*d*, and the society proved in the bankruptcy for that amount, which included

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the 2*l.* which he was convicted of embezzling. In October, 1894, the debtor applied to the county court judge for his discharge, and such application was opposed by the official receiver on the ground, inter alia, that the embezzlement in respect of which he had been convicted was "a felony connected with his bankruptcy" within the meaning of s. 8 of the Bankruptcy Act, 1890. (1) The county court judge was of opinion that it was not so, and only suspended his discharge for a further period of three years. The Board of Trade, under the powers given to them by rule 237 of the Bankruptcy Rules, appealed against such order to the Divisional Court.

Muir Mackenzie, for the Board of Trade. Wherever a person steals money and afterwards becomes bankrupt, if the owner of the money proves in the bankruptcy for the sum so stolen, the theft thereby becomes an offence connected with the thief's bankruptcy. If it does not, it is difficult to see what offences other than offences under the Debtors Act, 1869, and the principal Act, can be connected with the bankruptcy.

Strachan, for the debtor. There are many offences which might properly be regarded as connected with the bankruptcy besides those coming under the two Acts mentioned—for instance, perjury or subornation of perjury in the course of the bankruptcy proceedings, forging an order of Court in the bankrupt's favour, or falsifying proceedings on the file. If the contention of the Board of Trade is right, then if a man were convicted of a criminal libel and ordered to pay costs, or were sued for the seduction of a girl under sixteen and cast in damages, and inability to pay such costs or damages resulted in his bankruptcy, the libel or seduction would be an offence connected

(1) By s. 8, sub-s. 2, of the Bankruptcy Act, 1890, "On the hearing of the application (for the bankrupt's discharge) the Court . . . may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time. . . . Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines."

with his bankruptcy—a proposition which could not be seriously contended for.

Muir Mackenzie, in reply.

VAUGHAN WILLIAMS J. This is an appeal against an order of the county court judge of Newcastle ordering the discharge of the bankrupt to be suspended for three years, and the ground of the appeal is that the judge, instead of merely suspending the discharge, ought to have refused it altogether. The law on this subject is contained in s. 8 of the Act of 1890, by which it is provided that "the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines." And, the bankrupt having been convicted of embezzling a sum of money which he had received as the servant of the directors of a building society, it was contended that that offence was a "felony connected with his bankruptcy" within the meaning of that section. The county court judge held that it was not, and in so holding I think he was right. It is not very easy to define precisely what is meant by the words "connected with his bankruptcy," but I think we may get a guide to their meaning by looking at the kind of misdemeanours which are dealt with by the Debtors Act, 1869, and by the principal Act, for I think that under the head of misdemeanours and felonies "connected with his bankruptcy" it was intended to include only such as would be ejusdem generis with the misdemeanours dealt with by those two Acts. Taking, then, that view, I will endeavour to point out the sort of offence which I think could properly be described as connected with the bankruptcy. I think, in the first place, that it would certainly be an offence connected with the bankruptcy if there was a conviction upon facts which resulted in or brought about the debtor's insolvency; secondly, I think it would be an offence connected with the bankruptcy if the facts upon which the conviction was based consisted in misconduct by the debtor either as a bankrupt, or in view of impending bankruptcy. The legislature in the Debtors

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Act, 1869, over and over again treats it as a crime for a debtor so to conduct himself, in anticipation of immediate bankruptcy, as to defeat the policy of the bankruptcy law, or to increase his liabilities, or to diminish his estate. Those, I think, are the kinds of offences which are intended to be included under the head of offences "connected with his bankruptcy." And I do not think that the particular offence with which we have to deal here comes within the classes which I have indicated. Quite irrespective of any impending bankruptcy, it was an offence in the debtor to embezzle this money. I do not find upon the evidence that the offence was committed in view of bankruptcy at all.

KENNEDY J. I have come to the same conclusion, and I adopt the description which my brother Williams has given of the classes of offences which are connected with the bankruptcy within the meaning of s. 8 of the Act of 1890—a description which, though necessarily somewhat general in its terms, seems to me the best that under the circumstances can be given. The offence of which the bankrupt was here convicted cannot fairly be said to come within that description.

Appeal dismissed.

Solicitor for appellants: *Solicitor to the Board of Trade.*
Solicitor for debtor: *C. Rogers, for Criddle, Newcastle-on-Tyne.*

J. F. C.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

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March 7, 8, 9, 11, 14, 15, 16; *April* 10.

THE MANSION HOUSE ASSOCIATION ON RAILWAY TRAFFIC *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Railway — Regulation — Railway Commissioners — Undue Preference — Home and Foreign Merchandise — Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.

By the Railway and Canal Traffic Act, 1888, s. 27, sub-s. 1, where any railway company charges some traders lower rates than others, for the same or similar merchandise, or for the same or similar services, or makes any difference in treatment, "the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company."

By sub-s. 2, in deciding as to undue preference, the Commissioners may, "in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall . . . . the Commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."

On an application against a railway company alleging undue preference in charging lower rates for foreign than for home merchandise:—

Held, that the effect of this proviso is not to prohibit all inequalities in rates as between home and foreign merchandise, but that, if the railway company have proved facts which would justify the admitted differences, had the goods in both cases been home goods, the company are not debarred from relying on those facts as an answer, merely because the goods which receive the benefit of the difference are of foreign origin.

APPLICATION by the Mansion House Association on Railway Traffic, an association of traders holding a certificate, granted by the Board of Trade under s. 7 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), entitling them to make complaint to the Railway and Canal Commissioners. The association complained that the railway company gave an undue preference to traders in certain articles of foreign merchandise, namely, bacon and hams, butter, cheese, lard, wool, hops, hay, and fresh meat, by charging lower rates in respect of the same or similar services

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to traders in such merchandise than they charged for the same or similar services to traders in the same artices of home merchandise. The foreign merchandise in question was carried on the respondents' railway from Southampton Docks to London, and the home merchandise was carried to London from Southampton town and fourteen other stations on the respondents' railway, which were specified in the complaint. The facts, so far as they are material to the point as to the construction of the statute, for which the case is reported, are stated in the judgments, and the provisions of the section of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27, on which the decision turned, are set out in the judgment of Collins J., post, page 930.

March 7, 8, 9, 11, 14, 15, 16. The complaint was heard before the three Commissioners, and witnesses were examined, and documentary evidence produced.

Sir Henry James, Q.C., Balfour Browne, Q.C., and *H. Sutton,* for the complainants, the Mansion House Association.

Sir Richard Webster, Q.C., C. A. Cripps, Q.C., Moon, and *Acworth,* for the respondents, the London and South Western Railway Company.

Littler, Q.C., and *Batten,* for the corporation, the Chamber of Commerce, and the Harbour Board of Southampton, who appeared in opposition to the application.

Cur. adv. vult.

April 10. The following judgments were delivered.

COLLINS J. This case comes before us under rather peculiar circumstances. The complainants are an association of traders holding a certificate granted under s. 7 of the Railway and Canal Traffic Act, 1888, and they complain that the respondents have given an undue preference to traders in certain named articles of foreign merchandise by charging lower rates in respect of the same or similar services to traders in such merchandise than they charge for the same or similar services to traders in the same articles of home merchandise. They complain that, whereas a charge in most cases of 6*s.* only is made for the conveyance of such foreign merchandise from Southampton

Docks to London, a distance of seventy-six miles, a charge ranging from 13*s.* 11*d.* per ton from Southampton town, (which is equidistant—namely, seventy-six miles from London), to 8*s.* 4*d.* per ton from Woking, (twenty-three miles), is charged for the conveyance of home merchandise of the same description. The rate of 6*s.* per ton applies to "traffic to and from all ocean-going steamers when the railway charge is paid by the steamship company or their agents out of the through freight and the traffic is conveyed in full truck-loads, and it does not include any services rendered or accommodation provided at Southampton Docks." The case, as I have said, comes before us under peculiar circumstances. It is nominally brought by an association of traders, but it was really launched and is maintained, as the applicants admitted, by a dock company which is in competition with the respondents. Thus, it came about that the articles selected for attack are not, with two or three exceptions, articles in which there is any substantial home trade between the places named and London, but are articles as to which there is an active competition between the ocean route to London direct and the route viâ Southampton and the respondents' railway. As to several of the articles named, no evidence whatever was called by the applicants to prove a grievance, and from a table put in by the respondents it would seem that the aggregate tonnage from all the stations named (omitting Southampton, which appeared by counsel to resist the application) was, over a period of more than nineteen months, for each of the articles except hops, hay, and fresh meat, from three to a little over four tons, while of lard there was not a single consignment, and of wool only two, amounting together to about a ton. There was no evidence that the home trade had been larger in these articles at any previous period, or that any complaint had been made to the company. But, though the real applicant in this case is the London Dock Company, the Mansion House Association are entitled to the relief which they claim if they can establish an undue preference. On the other hand, the respondents in their answer unquestionably sought to justify the difference in charges by two considerations, which were vehemently repudiated by their counsel at the hearing—namely, that the charge of 6*s.* was

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"an apportioned amount of a through rate," entitling them to exact a smaller proportional charge in view of the longer distance traversed, on the well-recognised principle of "long lead, low rate"; and, secondly, that the charge was necessarily no higher, in order to enable them to compete successfully with the ocean route to London direct. All the ingenuity of Sir Richard Webster failed to convince me that the author of the answer did not rely largely, if not mainly, on these contentions. Indeed, one of the rates contrasted is that from Southampton town, which is the same distance from London as the docks; and what bearing "through rate" could have upon this difference, unless the route began at some point further off than Southampton, I am at a loss to understand. They, however, set up another justification, also based on the difference of circumstances under which the traffic is received and dealt with in the two cases, and they are entitled to contend that they can make good their answer without relying on either of the two discarded topics; but the prominence given to those topics in the answer necessarily invites close scrutiny to the facts on which alone they now rely. The case is of great importance, as it raises for the first time for decision a question upon the construction of the clause in s. 27 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), which deals with difference of treatment between home and foreign goods. The section runs as follows:—

"1. Whenever it is shewn that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

"2. In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into considera-

tion whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant. Provided that no railway company shall make, nor shall the Court, or the Commissioners, sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise in respect of the same or similar services."

The applicants contend that this section has, by the proviso to sub-s. 2, excluded from consideration all those matters which are properly regarded as material on the question whether there has been an undue preference as between traders in home merchandise. The first clause, they say, throws on the railway company the onus of proving that an admitted difference in the charge for the same or similar merchandise or for the same or similar services is not an undue preference; the second goes on to give legislative sanction to the consideration on this question of certain specified matters which may negative or excuse the preference; and then comes the proviso, which expressly excludes all such matters from discussion in cases of difference between home and foreign merchandise, by in terms enacting that no difference of charges for, or treatment of, home and foreign merchandise shall be made by the company, or sanctioned by the Commissioners, in respect of the same or similar services. That thus, while the 1st sub-section, in the case of home merchandise, on proof of such a difference, merely calls on the railway company to justify it, the proviso, in a case between home and foreign merchandise, forbids it altogether. Nor can this result of the section be avoided—they say—by contending, as the respondents contend, that the services are not the same or similar where they can be rendered by the company at smaller cost and with larger returns in the one case than in the other, for the words used in both parts of the section are the same—namely, "same or similar services." The first part treats a difference of charges in respect of the same or similar services as merely primâ facie evidence of a preference, and invites the company to negative it, as they may do by proving that the

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conditions under which the services are rendered are wholly dissimilar; the second part forbids the making any difference at all. But the difference which has to be justified and the difference which is absolutely forbidden must be in respect of services used in the same sense in both cases, the services which the trader receives and which he can describe in proving his primâ facie case. The services, therefore, that the legislature is dealing with in both cases must be services from the standpoint of the trader; in the first case a proved difference may be justified by shewing that, from the standpoint of the company, it is not undue, while in the second case such proof is excluded, because the difference is itself forbidden and therefore incapable of being justified. This, as I understand it, was the argument finally put forward for the applicants, though I do not think the case was opened entirely from that point of view by Sir Henry James.

It is obvious that this argument, if accepted, would involve the most momentous consequences—consequences which Mr. Balfour Browne did not dispute. For instance, let us assume that some trader in Southampton made it his business to collect home merchandise of the description named in the application, and to deliver it to the railway company there at fixed dates and in large quantities, just as the respondents now deliver foreign merchandise, for delivery to London, and was charged by the company the same rate—namely, 6*s.* a ton. On a complaint by the present applicants impugning such charge as an undue preference, it would be open to the company to justify it by urging all those topics which have been recognised by many decisions and are sanctioned by sub-s. 2, such as difference of conditions, reducing the cost and increasing the profit of the company, the existence of competition by land or water from Southampton to London, and so forth; and if they proved their facts they might be entitled to have the complaint dismissed. But on a similar application in respect of goods brought from America or France, all the facts being identical except the place of origin of the goods, the company would be bound to fail, because they would have to admit a difference which they would be debarred from justifying. This would be a strange result of a clause which

purports to strike at any difference of treatment between home and foreign goods. The railway would be debarred from dealing with them in a manner profitable to themselves and beneficial to the public, and wholly justifiable were they English goods, simply because they came from abroad. But I need not enlarge upon the consequences, which are certainly startling. The question is—Did the legislature, in the year 1888, by a proviso to a sub-section of a Railway and Canal Traffic Act, introduce such a revolution? Nothing short of the clearest language could persuade me that the legislature ever had any such intention, and I am of opinion that full effect can be given to the proviso without adopting the contention of the applicants. I fully recognise the logical difficulty in the way of the respondents' argument. Their main contention was that "in respect of the same or similar services" in the proviso is equivalent to "under the same or similar conditions," and I think it is not easy to answer Mr. Browne's point that this involves using the words "same or similar services" in different senses in two different parts of the same section, and, moreover, it seems to leave nothing for the proviso to operate upon, for if the words are to be read in this large sense they seem to cover the whole area of undue preference, and enact nothing special at all as to differences between foreign and home merchandise. I think, however, the same result can be arrived at without thus straining the meaning of those words. It must be remembered that the crucial sentence is contained in a proviso—a proviso to a sub-section which is dealing with the topics which may properly be considered in determining whether a proved difference is or is not an undue preference. Now, the proper function of a proviso is to limit or qualify the effect of that to which it is a proviso, not to undo or rescind that which has been already enacted. Now, when we come to the proviso we have got to this point—namely, that a primâ facie case of undue preference has been made, and we are considering what will be sufficient to excuse it, and while in very wide words we are empowered "in addition to any other considerations affecting the case" to take certain other named matters into consideration also as justifying the preference, we are pulled up by the proviso and told in effect that among "the

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considerations affecting the case" is not to be included the fact that the goods, in respect of which the preference is asserted, are foreign as distinguished from home merchandise. The railway company shall make, and the Commission shall sanction, no difference between them *as such*. This construction does not seem to me to involve any serious straining of the words, and it has the merit of construing the proviso as being really a proviso cutting out a special ground of excuse and leaving all the others open.

But, it may be said, what is there in that view for the proviso to operate on, what is there, that might have been considered as an excuse but for the proviso, which is excluded by it? I think I can point to one consideration at least which might have been urged and which is excluded by the proviso—namely, that the goods have already traversed a long distance before they reached the United Kingdom and are entitled to a lower rate in consequence, treating the portion traversed in the United Kingdom as part of a through route. I say I can conceive such a consideration being urged, for it was, in point of fact, put in the forefront of Sir Charles Scotter's answer in this case, though it was repudiated and abandoned by his counsel, and I think the proviso excludes it; because this would be an advantage claimed or difference justified in respect of something necessarily peculiar to foreign goods, and in which home goods could not participate. It may be that for the like reasons the proviso would exclude another matter which also had a prominent place in Sir Charles Scotter's defence, but which was also repudiated and abandoned by Sir Richard Webster—namely, the ocean competition to London. It is not, however, necessary to pronounce an opinion upon this, as I have given one instance, at least, which might justify the existence of the proviso, and it is possible that many more might be given. Treating, therefore, the defences of through rate and foreign competition as out of the case, I am of opinion that, if the railway company have proved facts which would justify the admitted differences had the goods in both cases been home goods, the company are not debarred from relying on those facts as an answer merely because the goods which receive the benefit of the difference are of foreign origin.

There is no definition of foreign merchandise in the Act, and if the applicants' argument is to prevail how are they to be defined? Do they carry with them for ever the vice of their origin? If not, when and how do they get rid of it, since ex hypothesi it is the fact of their origin and not the method of their treatment which turns a difference into an undue preference?

Yet another construction of the section has been suggested, for which it is claimed that it would make most of the facts proved in this case by the respondents relevant and proper for our consideration, and also would leave something for the proviso to operate upon. It is suggested that everything which shews that the services, properly so-called, are not the same or similar, may be considered, but that the proviso excludes from consideration everything that does not affect the cost at which the services are rendered by the company, and that, therefore, in the case of foreign goods, home competition by land or water cannot, any more than competition from points outside the kingdom, be taken into consideration. This construction does not commend itself to my judgment. I think the object of the section was to level differences—not to create arbitrary inequalities between the treatment of home and foreign merchandise; and I can see no reason or principle in leaving out of account the fact of a rival route by rail or water from the point of departure in this country to the point of arrival, in the case of goods coming from abroad, and taking it into account, as it clearly may be taken into account, where the comparison is between home goods only. It is further open to the criticism that the words "same or similar services" are not used in the same sense in both sub-sections.

These observations dispose of the legal point in the case. The applicants further contend that, even if all the considerations pressed by the company are admissible, there is nevertheless an undue preference in fact. It was not, however, contended that we were debarred in point of law from considering any of the matters submitted to us on this part of the case, and therefore it becomes merely a question of fact.

Upon the facts I should bow to the opinion of my colleagues, even if I differed from them. Their view is—for reasons which

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they will give in detail—that, as to all articles except hops, hay, and fresh meat, the respondents have made good their answer; but that as to these three articles some modification must be made. I cordially agree as to hops and hay, but confess to some misgivings as to fresh meat. I should not, however, differ from my colleagues on a question of fact.

SIR FREDERICK PEEL. This is a complaint of the difference which the London and South Western Railway Company make in their rates to London for certain kinds of agricultural produce, according as the conveyance is from Southampton Docks or from Southampton town and other stations on their railway. The stations selected are fifteen in number, and the agricultural produce comprises bacon and hams, butter, cheese, lard, hops, hay, fresh meat, and wool. In the conveyance of these articles from the docks, a distance of seventy-six miles, the rates to Nine Elms are 5*s.* a ton for hay, and 6*s.* a ton for the other articles (fresh meat excepted), and with these rates the applicants compare the inland rates to London for articles of the same kind, as, for example, the rate of 15*s.* for hops from Alton, forty-five miles, and 8*s.* 6*d.* for hay from Micheldever, fifty-six and three-quarters miles, and of 17*s.* 11*d.* for bacon and hams from Southampton town station, distance seventy-six miles. It is alleged that the difference made is in breach of a provision of the Railway Traffic Act, 1888, relating to differences of treatment between home and foreign merchandise, and is also an infringement of the Traffic Act, 1854, prohibiting undue or unreasonable preferences. The provision referred to is in the 27th section of the 1888 Act, which, after enacting in sub-s. 1 that if it is shewn that a railway company charges one trader or the traders in one district "lower rates for the same or similar merchandise, or lower rates for the same or similar services," than it charges other traders, or the traders in another district, the burden of proving that much lower rates do not amount to an undue preference shall lie on the railway company, goes on to enlarge the considerations which may furnish a ground on which the existence of a difference in the rates may be justified, and then adds this proviso: "Provided that no railway company shall

make, nor shall the Court, or the Commissioners, sanction, any difference in the tolls, rates, or charges, made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."

Now, as to the effect of this proviso, I do not think it would be satisfied by taking it to mean no more than that, in any complaint under the Traffic Acts as to the treatment of goods of a like nature in respect of the same or similar services, it shall be a matter of no account in applying those Acts, in a case between home and foreign goods, that a railway company's proportionate share of the through charge for foreign goods cannot but be small, having regard to the greater or less distance such goods coming across sea must necessarily be brought. If that were all, the proviso was quite unnecessary, for on no occasion has anything special to foreign merchandise, by reason of its being foreign, been considered to entitle it to be specially favoured, or to have a preference given to it over other merchandise. The proviso seems to me to mean more than this, and to require, in reference to home and foreign articles that compete with each other in the market, that in respect of the same or similar services, there shall not only be no difference of rate involving an undue or unreasonable preference, but no difference of any kind. It means, I think, that, given the same or similar services, considerations which in other cases might justify an inequality of rate are here not to be regarded. Take competition, for instance. Much has been said in this case of the railway and the rates from Southampton Docks to London having to compete with other modes of conveyance and with the rates offered by sea. There are rival routes to London, both direct from the foreign port and by steamers from Southampton, and their rates are as low or lower than the railway rates, so that, even if the home agricultural produce had an exclusive use of the railway, it would sell no better than at present in the London market. It is clear however that the services by railway are made neither greater nor less by the existence of competing routes, and competition, therefore, is not a ground on which, where this proviso operates, a difference can be sanctioned. It is quite possible that the chief purpose for

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which the proviso was passed or inserted was to prevent competition in the case of foreign merchandise being made the ground for reducing the rates for its conveyance, and to require such rates to be judged solely with reference to services rendered by the railway company.

The services in respect of which no difference in rates is allowed are the same or similar services, and where this is not the case, the intention is, I think, that differences in rate or treatment shall be such only as the degree in which the services may not be similar may make reasonable. What, then, is the test of services being the same or similar? Are they so when there is inequality in the cost at which they are rendered? We know that it is cheaper in cost per mile to carry long distances than short ones, and to carry for a large customer than for one who sends only small consignments. This is recognised in the Companies Charges Acts, 1892 (1), which establish differences in rates per mile in reference to distance and quantity. In judging, then, of services it is material to consider cost of working, and if foreign goods are supplied in such a manner—by the way, for instance, they are packed—as to diminish the cost of transport, rates lower for them than for home goods costing more to carry do not appear to be disallowed by anything contained in the proviso. But I do not think gross receipts are equally good as a measure or evidence of services and their value. The railway company give as their chief reasons for the lower rates the greater average weight of consignments of foreign goods and the excess in the earnings of a truck in a train from the docks over the earnings of a truck in an ordinary goods train. The dock rates, according to the company's rate-book, are limited to traffic consigned in full truck loads, and, as a rule, goods landed at the docks (owing to the large quantities in which they are consigned) are carried in full truck loads, as against a light load per truck in the case of home goods. And it is not the quantity only that causes the difference, and makes import traffic, even at its lower rates, pay better per truck than the home traffic, and yield, it is stated, on an average 4·4*d.* per truck per mile to 3*d.*

(1) Railway Rates and Charges Acts, Nos. 1–26 (55 & 56 Vict. cc. xxxix.–xiv. inclusive).

from home goods. It is also better packed and closer pressed, and a ton, or any other weight, of foreign goods will take up less room in a truck than an equal weight of home goods. There is, of course, an economy in working where for the same quantity of goods it is sufficient to run a single truck in the one case to two or more trucks in the other, and the same is true of modes of packing which facilitate unloading and make it easier to handle the goods. In these respects the weight of consignments affects cost and bears upon the case between home and foreign goods. It has an effect also in regard to other services—such as clerkage, weighing, checking, and the like, in the rendering of which Sir Charles Scotter said a company can deal with a large consignment at a rate per ton a great deal cheaper than with a number of small consignments. But as to these, its effect upon them may, I think, in this case be left out of account, because the rates from the docks to London do not include charges for services in Southampton Docks, and the services above referred to are amongst those done in the docks by the shipping companies, or, as to some goods—wool, for instance, brought by the Union Line—by the railway company acting in their capacity of dockowners, and are separately charged for. Foreign and home goods differ also in the matter of trains. A full train is made up in the docks, and goes straight to London without stopping, and as a fast train, while the ordinary goods train stops at the intermediate stations to pick up, and requires more time to accomplish the distance. But, though the train loads differ, the trains probably have each the same complement of trucks, and the expense of running them, except in the time saved by the continuous running, would not be very different. On this point, however, we had no information in figures brought before us. In comparing rates it is important to see that they cover the same number of services, and in this respect there is some difference between the rates in question. There is, as I have said, no Southampton terminal in the dock rates of 6*s.* and 5*s.* It is a separate charge costing 2*s.* 9*d.* a ton, and for goods by the American liners (owing to the shortness of the interval between their arriving in dock and again leaving) rather more. For the purpose of comparison,

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therefore, the home rates, which, as quoted in the application, contain a terminal at either end, must be taken as less by one terminal.

Now, so far as this application is a complaint of the high rates on home traffic forwarded from the Southampton town station, it is, I think, a sufficient answer that, besides there being no evidence to support it, all the chief local authorities, including the corporation and the Chamber of Commerce, have appeared in opposition to it. I also think that there is no sufficient case upon the evidence for our interfering with the local rates to London from any of the other fourteen stations on the traffic in bacon and hams, butter, cheese, lard, and wool. [The learned Commissioner then proceeded to deal in detail with the evidence as to the carriage of fresh meat, and expressed his conclusion as follows:—]

As the case stands I do not think there has been evidence produced to account for the whole of the difference, and, in the absence of such proof, the applicants are entitled to an order that home and foreign meat shall be carried on equal terms, subject to due allowance for difference in cost of working. [He then dealt with the evidence relating to hops and hay, and expressed his opinion that an order ought to be made as to both those articles.]

VISCOUNT COBHAM. If in this case we had only to deal with sub-s. 2 and its proviso, it might, I think, be fairly argued that the expression "same or similar services" means services rendered by the railway company, as distinct from services rendered to the trader. The sub-section allows certain pleas to be raised by the railway company in justification of a preference, and "services" in the proviso to the sub-section might naturally mean services from the railway standpoint.

But the learned Judge has pointed out the objections to this construction, having regard to the meaning that must be attached to the phrase in other parts of the section. His view of the meaning of the proviso however leads to the same conclusion, although by another way, and, as it seems open to fewer difficulties than any other interpretation which has been

suggested to us, I think it should be adopted. I shall not, of course, go over the ground which the learned Judge has traversed, but shall only add a few words on a point which I think of importance, but which has not been more than alluded to. Mr. Balfour Browne contends that the whole of the evidence which has been given on behalf of the railway company is absolutely irrelevant under the proviso, and he does not shrink from the conclusion that if he is right in his view the result would be "very like protection." No doubt, if that was the clear intention of the legislature, it is not for us to discuss its propriety, but to give effect to it.

Where, however, the intention of the legislature, as in this instance, is not easily gathered from the language of an Act of Parliament, we are entitled, in endeavouring to elucidate it, to follow out the consequences which would seem to flow from this or that interpretation. The more novel or momentous the consequences, the more explicit and direct should we expect the enactment to be. The contention of the applicants as to the meaning of the sub-section and proviso seems to be shortly this: a difference in charge between home and home merchandise, in respect of the same or similar services to the trader, may be justified by certain considerations, but such a difference, in the case of home and foreign merchandise, shall not be so justified, but is absolutely forbidden. If this view is to prevail, then *cadit quæstio*. To admit, as is here admitted, any difference of charge between home and foreign goods, would be to admit an undue preference, whatever the circumstances of the traffic. What consequences would follow? In an ordinary case of undue preference, where home merchandise is alone concerned, it is open to the railway company to abate an undue preference by a comparatively slight adjustment of rates, it may be, while maintaining a difference proportionate to the conditions of the traffic. But if the consideration of these conditions is to be excluded, as is here contended, no mere adjustment would suffice. Every difference must be extinguished. In the case before us the railway company would be called upon to abate the preference, either by lowering their local rates to the level of their shipping rates, or by raising their shipping rates to

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the level of their local rates. If they adopted the former alternative, they would have to carry goods, comparatively troublesome, and expensive to handle, at rates that could only be remunerative when charged upon traffic involving a minimum of trouble and cost to the company. To illustrate this point:—we are told that the gross earnings of the goods and mineral traffic of the South Western Railway, deducting shunting allowances, are less than 5*s.* per train mile. To get at the net earnings, the cost of working the traffic must be deducted. This cannot be exactly given, but the cost of working the whole of the South Western traffic is about ·56 of the gross receipts. Whatever reasonable deduction may be made for the possibly smaller cost of working goods traffic, it is clear that there is no margin for a large reduction of the rates charged. Yet an equalization of the shipping and local rates between Southampton and London, by means of a reduction of the latter, would involve in many cases a fall of at least 50 per cent. When it is added that the company would run the risk of being called upon to effect a similar reduction upon similar traffic throughout the whole of their system, it must be admitted that the consequences to them would be of great gravity.

The other alternative would be to raise the shipping rates to the level of the local rates.

These shipping rates are charged upon traffic of a highly competitive character, and we may take it that they are fixed at the highest point that is consistent with securing a remunerative share of the traffic. I am not introducing competition to justify the preference, but only as a factor in the result which it seems to me will inevitably follow upon the raising of the Southampton Dock rates, namely, the loss of the whole shipping traffic to the railway. A slight increase would probably have this effect; any approximation to the level of the local rates most certainly so. It is not denied that the traffic would go to London by sea all the same, and at the same rates as before. The only difference would be that the railway company would be more or less impoverished, not to the advantage of the farmer, who would gain nothing, but solely to the advantage of the

shipping interest, which is not, of course, wholly a British interest.

Further, the policy of the legislature, as interpreted by the Railway Commission since its first institution, has been to multiply routes for the access of merchandise to our great centres, rather than to restrict them. But if the respondents elected under pressure to give up their Southampton Dock traffic, one important route for the supply of food stuffs absolutely indispensable to the people of this country would be closed.

Consequences such as these must be regarded as of far-reaching importance; so far as they involve protection to any class or interest, they constitute a reversal of a long-established national policy. I cannot persuade myself that so momentous a decision would be embodied in a proviso of apparently limited application and in language that admits of doubt.

I am of opinion, therefore, that, if not by the use of the words "same or similar services," then by the general sense of the proviso as interpreted by the learned Judge, it is intended that, in cases where undue preference of foreign goods is alleged, we should take into consideration, as we have always been entitled to do in the case of home goods, the circumstances of the traffic as regards its quantity, its packing, its regularity, and all other matters affecting its cost to the company, except so far as they may be matters special to the foreign origin of the goods. That is the limitation imposed by the proviso, the object of which is, in my opinion, not to give home traffic a preference over foreign traffic, but to place them in a position of strict equality.

I have given the facts and figures brought before us in much detail the careful consideration which they require, for I felt that Mr. Balfour Browne was not far wrong when he said that the respondents' line of defence was an afterthought, and that they had the difficult task before them of justifying by one set of considerations a rate that had been governed by another. However, they are entitled to do this if they can, and I think they have been successful so far as the shipping rates are concerned.

[The learned Commissioner then dealt with the evidence, and stated that as to hops and hay he concurred with Sir Frederick

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Peel in thinking that the difference in home and foreign rates for those articles was somewhat excessive. As to fresh meat he thought that if meat was to be included in the order, a very slight readjustment would meet the requirements of the case.]

Order for modification of rates, as to hay, hops, and fresh meat.

As to other merchandise, application refused.

Solicitors for applicants: *Neish, Howell, & Macfarlane.*

Solicitors for respondents: *Bircham & Co.*

Solicitor for Southampton Corporation: *G. B. Nalder, Town Clerk of Southampton.*

P. B. H.

C. A.

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April 24.

[IN THE COURT OF APPEAL.]

KELLY *v.* METROPOLITAN RAILWAY COMPANY.

Practice—Costs—Action founded on Tort—Railway Company—Passenger—Personal Injury — Negligence of Company's Servant —Action in High Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action brought by a railway passenger against the company for personal injuries caused by the negligence of the servants of the company, while he was travelling on their line, is an action founded upon tort, whether the negligence charged is an omission on the part of the servant to do some act that he should have done, or the commission by the servant of some act amounting to a misfeasance.

Taylor v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* ([1895] 1 Q. B. 134) explained.

APPEAL from an order of a judge at chambers affirming an order of a master directing that the plaintiff's bill of costs should be referred back to be drawn on the county court scale.

The action was brought to recover damages for personal injuries to the plaintiff while a passenger on the defendants' railway. The statement of claim alleged an agreement by the defendants to carry the plaintiff safely, and a breach of that agreement in negligently and improperly managing the train in which he was, so that it ran into the wall at Baker Street Station, whereby the plaintiff sustained injury. It was admitted by the defendants that the accident occurred by the negligence of the

engine-driver in not turning off steam in time to prevent the train running into the dead-end at the station. A sum of 20*l.* was paid into court, and the jury returned a verdict for the plaintiff for 25*l.*

When the plaintiff's costs were taken in to be taxed, the master was of opinion that, on the authority of *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), the act of the engine-driver being one of omission, the action was founded on contract, and that therefore the plaintiff was only entitled to costs on the county court scale. On appeal, this decision was affirmed by Day J.

The plaintiff appealed.

April 23. *Kemp, Q.C.*, and *Cagney*, for the plaintiff, submitted that the action was in fact an action of tort, and was tried as such, and that the plaintiff was entitled to costs on the High Court scale.

Lawson Walton, Q.C., and *George Elliott*, for the defendants. The duty of the defendants was contractual, and they were bound to take due care not to injure the plaintiff. The act which caused the injury was an omission to turn off steam, and amounted to a nonfeasance. It was not an act of commission or misfeasance, and the defendants were not liable in tort. The distinction is dealt with in the judgment of Lindley L.J. and A. L. Smith L.J. in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), and the present case comes within that authority.

[They also cited *Foulkes* v. *Metropolitan District Ry. Co.* (2)]

April 24. LORD ESHER M.R. In this case the plaintiff was a passenger on the defendants' railway, and he has been injured by the act of one of their servants. The case was tried on the assertion of the plaintiff that the servant of the defendants was guilty of negligence, and the jury have found to that effect, and awarded 25*l.* damages. 20*l.* had been paid into court; and on this state of facts arises the question whether the plaintiff is only entitled to costs on the county court scale, on the ground set up by the defendants that the action is founded on contract. On the other side it is contended that the action is in tort. I do not mean

(1) Ante, p. 134. (2) 4 C. P. D. 267; 5 C. P. D. 157.

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on the pleadings, but that it was brought and tried as an action in tort. In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent that was a matter on which an action of tort could be brought. At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure. The question to be tried is the same in either case. The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial. Omission to do something which the defendants were bound to do, or an act of commission in doing something which they ought not to have done, may both be acts of negligence. The jury have to determine on the facts of the case, and if they found that there was negligence, which was the cause of the injury, they have in fact tried an action of tort, and the restrictions as to costs in an action of contract fall to the ground. The plaintiff is entitled to full costs, and the appeal must be allowed.

A. L. SMITH L.J. read the following judgment:—There appears to have been some misapprehension as to what was decided in the case of *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), to which I was a party.

The plaintiff in the present case was a passenger on the defendants' railway, and whilst lawfully riding in one of their carriages was injured by its being negligently run into a dead-end by the defendants' driver.

(1) Ante, p. 134.

It has been thought by the master, and also by Day J., that, because the negligence was that the driver omitted to turn off steam, this constituted a nonfeasance or omission within what was said in the above-mentioned case, and that as the plaintiff had recovered 25*l.* and no more he was only entitled to county court costs. I am clearly of opinion that this is not what was decided, nor is any such statement to be found in that judgment.

The distinction between acts of commission or misfeasance, and acts of omission or nonfeasance, does not depend on whether a driver or signalman of a defendant company has negligently turned on steam or negligently hoisted a signal, or whether he has negligently omitted to do the one or the other. The distinction is this—if the cause of complaint be for an act of omission or nonfeasance which without proof of a contract to do what has been left undone would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort, and as regards the County Court Acts and costs this is what was laid down in the above-mentioned case. The appeal should be allowed with costs here and below.

RIGBY L.J. I entirely agree. It appears to me that the attempt to dissect the act of the defendants' servant, and to treat the mere omission to turn off steam as a nonfeasance within the meaning of the cases referred to, altogether fails. An engine-driver is in charge of the train, and a passenger is in that train, independently of contract, with the permission of the defendants. That passenger is injured in consequence of the train being negligently brought into collision with the dead-end. The proper description of what was done is that it was a negligent act in so managing the train as to allow it to come into contact with the dead-end and so cause the accident. It is a case in which the company by their servant neglected a duty which

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they owed to the plaintiff—that is to say, it was a case in which an action of tort could be brought.

Appeal allowed.

Solicitor for plaintiff: *B. H. Van Tromp.*
Solicitor for defendants: *C. A. Mason.*

A. M.

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2. —— *Adjudication—Discretion to Postpone—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-s.* 1; *s.* 105, *sub-ss.* 2, 4; *s.* 109.] Upon an application for adjudication of bankruptcy against a debtor in a case within s. 20, sub-s. 1, of the Bankruptcy Act, 1883, the Court of Bankruptcy is not bound forthwith to adjudge the debtor bankrupt, but may for good reason adjourn the proceeding under s. 105, sub-s. 2, of the Act. IN RE LORD THURLOW. EX PARTE OFFICIAL RECEIVER - - - - - **C. A. 724**

3. —— *Annulment—Right to annul Adjudication—Debtor presenting his own Petition—Adjudication not for Benefit of Creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 8. *sub-s.* 1.] A creditor having obtained judgment for 294*l.* against a debtor possessed of an inalienable pension, took out a judgment summons against him for the payment of the debt by instalments. The debtor, with the intention of evading such proceedings, filed his petition in bankruptcy. The creditor was practically the sole creditor, and the assets were under 12*l.* The debtor having been adjudicated bankrupt in due course on this petition:—*Held*, that the presentation of the petition by the debtor under such circumstances was not an abuse of the process of the Court, and did not entitle the Court to annul the adjudication. EX PARTE PAINTER. IN RE PAINTER - - - - - **85**

4. —— *Assets—Title of Trustee—Act of Bankruptcy—Execution—Goods held by Sheriff for Twenty-one Days—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.] By the Bankruptcy Act, 1883, s. 45, an execution creditor is not entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (i.e., by seizure and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor.—And by the Bankruptcy Act, 1890, s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been either sold or held by the sheriff for twenty-one days:—*Held*, that the act of bank-

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ruptcy committed by reason of the sheriff's holding for twenty-one days the goods seized by him under an execution operates under s. 45 to make the execution itself void as against the trustee in bankruptcy of the debtor.—*Figg* v. *Moore* ([1894] 2 Q. B. 690) approved.—*Ex parte Villars* (Law Rep. 9 Ch. 432) distinguished. TRUSTEE OF JOHN BURNS-BURNS *v.* BROWN - - C. A. 324

5. —— *Bankruptcy Notice*—"*Final Judgment*"—*Action upon Order for payment of Costs*—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] An interlocutory order having been made by the Court of Appeal for the payment of costs by an appellant in an action in the Queen's Bench Division, the respondent brought an action against the appellant for the taxed amount of the costs, and obtained judgment for default of appearance:—*Held*, that although a bankruptcy notice could not have been issued against the appellant upon the order for payment of costs, yet such a notice could be issued upon the judgment, it being a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.—Dictum of Cave J. in *Re Shirley* (58 L. T. (N.S.) 237) disapproved. IN RE BOYD. EX PARTE MCDERMOTT - - - C. A. 611

6. —— *Bankruptcy Notice*—"*Final Judgment*"—*Order made upon Motion in Bankruptcy*—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] An order made upon a motion in a bankruptcy, declaring an assignment of property by the bankrupt in favour of a stranger to the bankruptcy to be void as against the trustee in the bankruptcy, and directing the assignee to pay the costs of the motion, is not a "final judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of the costs. IN RE A BANKRUPTCY NOTICE. EX PARTE OFFICIAL RECEIVER [C. A. 609

7. —— *Bankruptcy Notice*—*Irregularity*—*Amendment*—*Notice to One of several joint Debtors*—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*), *s.* 143.] Upon an application to set aside a bankruptcy notice, it appeared that an action had been brought against the debtor and five other persons, and judgment recovered against the debtor and three of his co-defendants. A bankruptcy notice served on the debtor stated that the judgment had been recovered against the debtor and all the five co-defendants, but the other particulars, such as date and amount, were correctly stated:—*Held*, that the defect in the notice was not material to its validity, as it could not prejudice or mislead the debtor, and that the notice could be amended under s. 143 of the Bankruptcy Act, 1883:—*Held* also, that, where judgment has been recovered against several persons jointly, a bankruptcy notice may be issued against one of the joint judgment debtors without including the others. IN RE LOW. EX PARTE GIBSON - - - - - C. A. 734

8. —— *Bankruptcy Notice*—*Judgment against Married Woman*—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 136—*Appendix, Form No.* 6.] A judgment recovered against a married woman does not, upon the death of her husband, render her personally liable to pay the judgment debt, so as to entitle the judgment creditor to issue a bankruptcy notice against her upon such judgment. IN RE HEWETT. EX PARTE LEVENE - 328

9. —— *Discharge*—*Conduct of Bankrupt*—*Suspension*—"*Undue Preference*" *of Creditors*—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 3 (*i*).] By the Bankruptcy Act, 1890, s. 8, the Court is required (as one of several alternatives) to suspend the discharge of a bankrupt for not less than two years if it is proved (inter alia) sub-s. 3 (*i*) "that the bankrupt has, within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors":—*Held*, that, if within the three months a bankrupt pays in full a creditor who would probably (though it is not absolutely certain that he would) be entitled to a similar preference in the administration of the estate in bankruptcy, that payment constitutes an "undue preference" within the meaning of sub-s. 3 (*i*).—*Semble*, that even if the creditor whom the bankrupt pays in full would certainly be entitled to a preference in the bankruptcy, the payment by the bankrupt constitutes an "undue preference." IN RE BRYANT. EX PARTE BRYANT - - - C. A. 420

10. —— *Discharge*—*Refusal of Discharge*—*Felony connected with the Bankruptcy*—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8.] Where a person embezzles money of his employer and subsequently becomes bankrupt, the mere fact that the employer proves in the bankruptcy for the amount so embezzled does not cause the offence to be "a felony connected with the bankruptcy" within the meaning of s. 8 of the Bankruptcy Act, 1890. IN RE HEDLEY. EX PARTE BOARD OF TRADE - - - - 923

11. —— *Distress*—*Landlord and Tenant*—"*Rent accrued due prior to Date of Order of Adjudication*"—*Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), *ss.* 9, 42, *Sched. II., r.* 19—*Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35).] Where a tenant becomes bankrupt during the currency of a quarter, so much of the quarter's rent as is apportionable to the part of the quarter prior to the date of the order of adjudication is by virtue of the Apportionment Act, 1870, "rent accrued due prior to the date of the order of adjudication" within the meaning of s. 42 of the Bankruptcy Act, 1883, and the landlord is entitled upon the expiry of the quarter to distrain upon the goods of the bankrupt for the same. IN RE HOWELL. EX PARTE MANDLEBERG & CO. - - 844

12. —— *Petition*—*Receiving Order*—*Debtor not domiciled in England*—"*Dwelling-house in England*"—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).] By the Bankruptcy Act, 1883, s. 6, sub-s. 1, a creditor is not entitled to present a bankruptcy petition against a debtor, unless (inter alia) "the debtor, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England":—*Held*, that a debtor, who had resided in a house of his own in England, but who had gone to reside abroad, and abandoned the house as his residence more than a year before the presentation of a petition

BANKRUPTCY—*continued.*
against him, and had not again adopted it as his residence, though he might at any time during the year, had he chosen to do so, have gone to reside in it, could not be considered to have had a "dwelling-house" in England within the period prescribed by the section. IN RE NORDENFELT. EX PARTE MAXIM-NORDENFELT GUNS AND AMMUNITION COMPANY - - - C. A. 151

13. —— *Petition—Amendment—Adding Petitioning Creditors—Time within which Creditors may be added—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 105.] The Court will not amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy upon which the petition is founded, creditors whose debts are other than those in respect of which the petition was presented. IN RE MAUND. EX PARTE MAUND - - - - - - 194

14. —— *Petitioning Creditor's Debt—Merger in Judgment—Existence of Original Debt for Purpose of Bankruptcy Proceedings—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 2.] The general rule that, where judgment has been recovered upon a simple contract debt, the original debt is for most purposes merged in the judgment, does not cause the judgment to operate as an extinguishment of the debt for the purpose of bankruptcy proceedings, and such debt is still available as a petitioning creditor's debt. The law in this respect has not been altered by the Bankruptcy Act, 1883. IN RE KING & BEESLEY. EX PARTE KING & BEESLEY - - - - 189

15. —— *Receiving Order—Petitioning Creditor's Debt—Judgment obtained by Compromise—Power of Court to go behind Compromise and Judgment—Fraud—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7.] On an application for a receiving order, where the petitioning creditor's debt is founded upon a judgment obtained by the compromise of an action, the Court of Bankruptcy has power to reject the debt as not being a good petitioning creditor's debt if, after inquiring into all the transactions between the parties leading up to the compromise and judgment, the Court can see that the compromise, although not fraudulent, was unfair and unreasonable:—So *held*, by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting.—Per Rigby L.J.: The Court has no power to reject the debt unless the compromise was, as between the parties, induced by the fraud of one of them, or was fraudulent in the sense of being made collusively for the purpose of representing in bankruptcy proceedings that to be a debt which in truth and reality was no debt. IN RE HAWKINS. EX PARTE TROUP - C. A. 404

16. —— *Receiving Order—Refusal to make Order—"Sufficient Cause"—Cesser on Bankruptcy of Bankrupt's Interest in only Asset—Attempt of Petitioning Creditor to extort Money—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.] A debtor had a life interest, which ceased on bankruptcy, in the income of certain property. He had no other property. He proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance, and paying his creditors a composition of

BANKRUPTCY—*continued.*
10*s.* in the pound. The petitioning creditor did not agree to this proposal, and a receiving order was made on his petition. On appeal:—*Held*, that the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made.—The petitioning creditor endeavoured to obtain 25*l.* from the debtor as a condition for agreeing to an adjournment of the petition:—*Held*, that as the petitioning creditor had made the petition a means of endeavouring to extort money from the debtor, no receiving order ought to be made on it. IN RE OTWAY. EX PARTE OTWAY - - - C. A. 812

17. —— *Scheme of Arrangement—Debt provable in Bankruptcy—Rejection of Proof by Trustee—Scheme binding on Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 8; *s.* 30, *sub-s.* 2; *s.* 37, *sub-s.* 3.] A petition in bankruptcy having been presented and a receiving order made against the defendant, a scheme of arrangement was agreed to by his creditors, including the plaintiff, who was a judgment creditor. The trustee disallowed the plaintiff's proof on the ground that the judgment was in respect of a debt incurred in a gambling transaction. The plaintiff thereupon issued execution on the judgment. On an application to stay execution:—*Held*, affirming the judgment of Pollock B., that the execution must be stayed, on the ground that the claim of the plaintiff was a debt provable in bankruptcy, and that he was therefore bound by the scheme although he had not received any benefit under it. SEATON *v.* LORD DEERHURST [C. A. 853

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—— Place used for betting—"Betting with persons resorting thereto" - 227
See GAMING. 3.

BILL OF EXCHANGE—*Alteration—Duty of Acceptor—Negligence—Accepting Bill which gives Facilities for Alteration—Stamp of larger amount than necessary—Estoppel—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-s.* 1.] A bill of exchange for 500*l.* was, after acceptance, fraudulently altered by the drawer into a bill for 3500*l.* The stamp upon the bill was sufficient to cover the larger amount, and the bill when accepted had spaces on the face of it in which the words and figures necessary for the alteration were afterwards written by the drawer. In an action by a holder for value against the acceptor to recover the full amount of the bill:—*Held*, by Lord Esher M.R. and Rigby L.J., that the acceptor of a bill owes no duty to the drawer, or any one taking the bill, other than to pay the bill on presentment, and that therefore the defendant, even if he was negligent in accepting the bill in the form in which it was presented for acceptance, was not estopped thereby from setting up the true facts, and was not liable on the bill otherwise than according to its original tenour:—*Held*, also, that the acceptance of the bill in the form

BILL OF EXCHANGE—*continued.*
in which it was presented was not evidence of negligence on the part of the acceptor:—*Held*, also, that even if the acceptor was negligent, the forgery and not the negligence was the proximate cause of the plaintiff's loss:—*Held*, by Lopes L.J. dissenting, that the acceptor of a bill owes a duty to subsequent holders of the bill to take reasonable precautions against fraudulent alteration; that the act of the defendant in accepting the bill, in the form in which it then was, was a breach of that duty and an act of negligence; that such negligence was the proximate cause of the belief of the plaintiff that the bill was good for the larger amount; and that, therefore, the defendant was liable for the full amount of the bill.—*Young* v. *Grote* (4 Bing. 253) considered. SCHOLFIELD *v.* EARL OF LONDESBOROUGH [C. A. 536

BILL OF SALE—*Formalities—Form in Schedule—Address of Grantor—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43).] The address of the grantor of a bill of sale appearing in the body of the bill need not be his actual place of residence or his place of business.—The grantor of a bill of sale carried on business at one address, resided at a second, and was a member of a club at a third, to which last-named address letters might be sent to him with the certainty that they would be received by him; his address given in the body of the bill of sale was that of the club:—*Held*, that the bill of sale was not void for deviating from the form in the schedule to the Bills of Sale Act, 1882. DOLCINI *v.* DOLCINI. CETTA, CLAIMANT - - - - - 898

2. —— *Registration—Assignment to Trustees for Benefit of Creditors—Limit of Time for Execution of Deed by Creditors—Exclusion of Creditors not executing Deed within limited Time—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.] A debtor assigned all his personal property to trustees for the benefit of his creditors by a deed which was duly registered under the Deeds of Arrangement Act, 1887, but was not registered as a bill of sale. The deed contained a proviso that no creditor, whether scheduled to the deed or not, should be entitled to any benefit under the deed unless he signified to the trustees his assent to the deed within three months of the date of its registration, he having had actual notice of the deed; that the trustees might, at any time, call upon any creditor to assent within seven days, and might, by notice to such creditor not assenting, exclude him from all benefit under the deed; that the trustees should have power at their discretion to revoke and recall any such exclusion and admit any creditor to the benefit of the deed upon receiving his assent; but that they should have no power to admit any creditor who did not assent within the three months:—*Held*, that, notwithstanding the imposition of the limit of three months within which a creditor having notice of the deed could assent to and become entitled to the benefit of it, the deed was "an assignment for the benefit of the creditors of the person making or giving the same" within the meaning of s. 4 of the Bills of Sale Act, 1878, and therefore did not require to be registered as a bill of sale.—*Ashford* v. *Tuite* (7 Ir. C. L. R. 91) approved and adopted. HADLEY & SON *v.* BEEDOM - - - - - 646

3. —— *Validity—Form in Schedule—Covenant to Produce Last Receipts for Rent—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.] A bill of sale contained a covenant by the grantor to produce his last receipts for rent, rates, and taxes—no demand in writing by the grantee being required—and a proviso that the chattels assigned should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—*Held*, that the insertion of the covenant did not render the bill of sale void as not in accordance with the form in the schedule to the Act. CARTWRIGHT *v.* REGAN - - - - 900

4. —— *Validity — Registration — Statutory Form—Assignment by same Deed of Chattel and Hire and Purchase Agreement affecting it—Severability of Subject-matter—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.] By one and the same deed the owner of a piano assigned, by way of security for money, the piano, and also the benefit of a hire and purchase agreement into which he had entered respecting it:—*Held*, that the assignment of the agreement was severable from that of the piano, and that, consequently, the deed was not void in toto under the Bills of Sale Acts for non-registration, or because it was not in the statutory form. IN RE ISAACSON. EX PARTE MASON - - - - C. A. 333

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BUILDING SOCIETY—*Arbitration—Jurisdiction of High Court of Justice—Neglect to appoint Arbitrators—Staying Proceedings — Mandamus—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16, 36.] The rules of a building society provided that disputes between the society and the members should be settled by arbitration; that five arbitrators should be elected by the board of directors; and that in each case of dispute the matters in difference should be decided by three of such arbitrators, to be selected by lot:—*Held*, that the High Court had no power to decide such disputes as fell within the rules, and would stay proceedings in an action brought by a member, even though the prescribed number of arbitrators had not been elected at the date of the commencement of the action:—*Held*, further, that arbitrators might be appointed by the society after the dispute had arisen, and that, if the

BUILDING SOCIETY—*continued.*
society neglected to appoint arbitrators in accordance with their rules, the proper course for the member was to apply for a mandamus to compel them to do so.—*Christie* v. *Northern Counties Benefit Building Society* (43 Ch. D. 62) not approved. NORTON *v.* COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY [C. A. 246

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—— *Ashford* v. *Tuite* (7 Ir. C. L. R. 91) approved and adopted - - - 646
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COUNTY COURT—*Costs—Interpleader Proceeding —"Subject-matter"—The County Court Rules*, 1889, *Order* L. *A*, *r.* 12—*Higher Scale of Costs, Col. C.*] Column C of the higher scale of costs in force in county courts applies "where the subject-matter or sum recovered exceeds 50*l.*"; and by Order L. A, r. 12, of the County Court Rules, 1889, "the 'subject-matter' in an interpleader proceeding shall mean, in the case of a claimant, the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged."—The claimant, in an interpleader proceeding to try the right to goods seized in execution on a judgment in the county court, paid into court 36*l.* to meet the amount in respect of which the execution was issued and all costs. At the trial of the claim, the county court judge adjudged that the claimant was entitled to all the goods seized and 10*l.*

COUNTY COURT—*continued.*
damages, with costs, and that the value of the goods seized was 51*l.* :—*Held*, that the claimant was entitled to have his costs taxed according to Col. C of the higher scale, because the "subject-matter" of the interpleader proceeding was the amount (plus the damages) found by the judge to be the value of the goods seized, and not the amount (plus the damages) paid into court. STUDHAM *v.* STANBRIDGE. STANBRIDGE, CLAIMANT - - - - - - - - **870**

2. —— *Jurisdiction—Remitted Action—Counter-claim for Unliquidated Damages—Power to order Trial in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.] An action of contract brought in the High Court, in which the claim indorsed on the writ does not exceed 100*l.*, can be ordered to be tried in the county court under s. 65 of the County Courts Act, 1888, although a counter-claim for unliquidated damages is set up.—*Mackay* v. *Bannister* (16 Q. B. D. 174) distinguished. GUILFORD *v.* LAMBETH **C. A. 92**

3. —— *Practice—Stay of Execution—Sufficient Cause—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 153.] By s. 153 of the County Courts Act, 1888, the judge has power to stay execution where it appears to him that the defendant is unable "from sickness or other sufficient cause" to pay and discharge the debt or damages recovered against him:—*Held*, that mere inability of a defendant to pay owing to want of means was not a sufficient cause within the meaning of the section, and that there was no jurisdiction to stay execution on the ground of such inability. ATTENBOROUGH *v.* HENSCHEL - - **833**

—— Agricultural Holdings Act, 1883—Jurisdiction of registrar - - **866**
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—— Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61)—Arbitration - - **174**
See LANDLORD AND TENANT. 2.

—— Contract—Tort—Railway—Action by passenger for personal injury - **134**
See PRACTICE. 4.

—— Jurisdiction—Tithes—Redemption money
See TITHES. [**31**

COURT—Colony—Judge—Act done in exercise of judicial office—Immunity from action
See JUDGE. [**668**

COVENANT—Quiet enjoyment—Duration of covenant - - - - **820**
See LANDLORD AND TENANT. 7.

CRIMINAL LAW—*Larceny—Threatening Letter—Demanding Money with Menaces—The Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 44.] In order to constitute the offence of sending a letter demanding money with menaces, within the meaning of 24 & 25 Vict. c. 96, s. 44, it is not essential that the "menace" should be a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime; the offence may be committed if there be a threat to accuse him of misconduct not amounting to an offence against the criminal law. THE QUEEN *v.* TOMLINSON - - - **C. C. R. 706**

2. —— *Libel—Sufficiency of Indictment—*

CRIMINAL LAW—*continued.*
Omission of Averment that Publication was "Malicious"—The Libel Act, 1843 (6 & 7 *Vict. c.* 96), *s.* 5.] By 6 & 7 Vict. c. 96, s. 5, "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the court may award, such imprisonment not to exceed the term of one year."—An indictment charged the defendant with "unlawfully" publishing a defamatory libel, but omitted to aver that it was published "maliciously":—*Held*, that the section did not create or define an offence, but merely enjoined the punishment to be awarded to an existing common law offence; that at common law an averment of malice was unnecessary, and the indictment was therefore good.—*Semble*, that if an averment of malice had been necessary, the defect would have been cured by verdict as being an imperfect averment. THE QUEEN *v.* MUNSLOW - - - - **C. C. R. 758**

3. —— *Nuisance—Keeping a "Brothel"—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 13, *sub-s.* 1—*Suppression of Brothels.*] A woman occupied a house frequented by day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for purposes of prostitution:—*Held*, that she had not committed the offence of "keeping a brothel" within the meaning of the Criminal Law Amendment Act, 1885, s. 13, sub-s. 1. SINGLETON *v.* ELLISON - - - - - **607**

4. —— *Perjury — Materiality.*] All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements.—The defendant had been charged with selling beer without a licence, and had falsely sworn that, when previously charged with a similar offence, he had not authorized a plea of guilty to be put in, and that such plea had been put in without his knowledge and against his will:—*Held* that, as such statements affected the defendant's credit as a witness, they were material, and he was rightly convicted of perjury. THE QUEEN *v.* BAKER - - - - **C. C. R. 797**

5. —— *Practice — Pleading — Indictment—Receiving Goods knowing them to have been obtained by False Pretences—Sufficiency without Statement of Nature of Pretence—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 95.] An indictment under s. 95 of the Larceny Act, 1861, for receiving goods, knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the receipt of the goods with knowledge that they had been unlawfully obtained by some false pretence, it is sufficient to allege this, without specifying the nature of the pretence. TAYLOR *v.* THE QUEEN - - - **25**

—— Assault—Master and servant—Criminal act done by servant in course of his employment—Responsibility of master—Conviction of servant—Release from civil proceedings for the same cause - **742**
See MASTER AND SERVANT.

CRIMINAL LAW—*continued.*

—— Practice—Summary Jurisdiction Act, 1879—Election of accused person to be tried by jury—Subsequent procedure before justices - - - - 119
See GAMING. 2.

CURTILAGE—Premises within the same curtilage — Metropolis — Management Acts — "Drain"—"Sewer" - 428, 433
See METROPOLIS. 3, 2.

DAMAGES — *Contract — Breach — Remoteness.*] The plaintiffs, a firm of stevedores, contracted to discharge a cargo from the defendant's ship, the defendant agreeing to supply all necessary and proper cranes, chains, &c., reasonably fit for the purpose of discharging the cargo. The defendant in breach of his agreement supplied a defective chain, which broke while being used, whereby one of the plaintiffs' workmen was injured. The defect in the chain might have been discovered by the plaintiffs by the exercise of reasonable care. The workman brought an action under the Employers' Liability Act, 1880, against the plaintiffs, who admitted their liability and paid him 125*l.*, which sum they now sought to recover from the defendant:—*Held*, that the injury to the plaintiffs' workman was the natural consequence of the defendant's breach of contract; that, as between the plaintiffs and the defendant, the plaintiffs were entitled to rely on the defendant's warranty; and that, the plaintiffs being liable to their workman for the injury he had sustained, the money which they had paid to settle his action was recoverable by them from the defendant as damages for his breach of contract. MOWBRAY *v.* MERRYWEATHER - - 857

—— Measure of—Warehouseman — Estoppel—Property in goods obtained by fraud—Jus tertii—Trover - - - 521
See BAILOR AND BAILEE.

—— Remoteness—Negligence - - 561
See NEGLIGENCE.

DEED—*Construction — General Words—"Ejusdem Generis."*] When in the operative part of a deed general words follow an enumeration of particular things, those words are primâ facie to be construed as having their natural and larger meaning, and are not to be restricted to things ejusdem generis with those previously enumerated, unless there is something in the deed which shews an intention so to restrict them.—By a post-nuptial settlement made by a husband upon his wife he demised to the trustees a leasehold messuage and premises, particularly described in a schedule, and he assigned to them "all the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits and other consumable stores, and other goods, chattels, and effects in, or upon, or belonging to" the leasehold messuage. In the schedule the leasehold premises were described as a piece of ground, "with the messuage, tenement, or dwelling-house, back buildings, coach-houses, stable buildings, and all other erections thereupon":—*Held*, that under the general words "other goods, chattels and effects" there passed to the trustees

DEED—*continued.*

the carriages, horses, harness, and stable furniture in or upon the coach-houses and stable buildings. ANDERSON *v.* ANDERSON - - C. A. 749

DEFAMATION—*Libel — Privileged Occasion — Constable—Publication ordered by Justices—Report made for Assistance of Court.*] Where the magistrates for a borough, for the purpose of facilitating the business of the general annual licensing meeting, ordered the defendant, who was head constable of the borough, to issue to persons having business before the meeting copies of a report made by him to the magistrates stating the grounds of objections taken to the renewal of licences:—*Held*, that publication by him of the report in pursuance of the magistrates' order was upon a privileged occasion, and therefore that, in the absence of actual malice on his part, an action was not maintainable against him in respect of grounds of objection so published, which the plaintiffs alleged to be a libel upon them. ANDREWS *v.* NOTT BOWER - - C. A. 888

2. —— *Libel — Newspaper — Payment of Money into Court with Defence of Apology—Admission—Damages—6 & 7 Vict. c. 96, s. 2—8 & 9 Vict. c. 75, s. 2—Order. XXII., r.* 22.] Where in an action for a libel contained in a newspaper the defendant pleads an apology and payment of money into Court under 6 & 7 Vict. c. 96, s. 2, as amended by 8 & 9 Vict. c. 75, s. 2, and the plaintiff leaves the money in Court and proceeds to trial, if the jury find the plea to be proved the plaintiff is entitled as of right to the whole sum paid into Court, notwithstanding that the jury may have awarded him a less sum as damages. Order XXII., r. 22, which provides that neither the fact that money has been paid into Court, nor the amount paid in, shall be communicated to the jury, does not in any way affect the issues upon a plea under the above sections. DUNN *v.* DEVON AND EXETER CONSTITUTIONAL NEWSPAPER COMPANY - - - - 211, n.

3. —— *Slander—Words imputing Misconduct in a Public Office—Special Damage immaterial—Municipal Corporation — Alderman — Amotion, Power of—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12–14, 39.] An action of slander will lie without special damage for words imputing dishonesty or malversation in a public office of trust, although the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not.—Therefore, where the defendant spoke concerning an alderman of a municipal borough words importing a charge that he had used his office for the purpose of dishonestly procuring advantage to himself:—*Held*, that an action of slander lay without proof of special damage.—By Lopes L.J.: The power of amotion from a corporate office incident to a corporation at common law exists in the case of an alderman of a borough subject to the Municipal Corporations Act; and also the words complained of were actionable as imputing a criminal offence. BOOTH *v.* ARNOLD C. A. 571

—— Libel—Indictment—Sufficiency—Omission of averment that publication was "malicious" - - - 758
See CRIMINAL LAW. 2.

DEMAND—Rate—Summons before justices for non-payment—Waterworks - 55
See WATERWORKS.

DISCHARGE—Bankruptcy—Conduct of bankrupt—"Undue preference" of creditors
See BANKRUPTCY. 9. [420

—— Bankruptcy—Refusal—Felony connected with the bankruptcy - - 923
See BANKRUPTCY. 10.

DISTRESS—Bankruptcy—"Rent accrued due prior to date of order of adjudication"
See BANKRUPTCY. 11. [844

—— Landlord and tenant—Attornment clause—Mortgage—Death of mortgagor - 375
See MORTGAGE.

—— New tenancy—8 Anne, c. 14, ss. 6, 7 516
See LANDLORD AND TENANT. 4.

DRAIN — Nuisance — Single drain connecting different houses with public sewer — Liability to repair - - - 685
See LOCAL GOVERNMENT. 3.

DRAINAGE—Contiguous houses - 428, 433
See METROPOLIS—MANAGEMENT ACTS. 3, 2.

DURESS—Goods—Principal and agent—Personal liability—Payment by agent to principal before notice of duress - 265
See PRINCIPAL AND AGENT.

ECCLESIASTICAL LAW—*Church Rate — Rate authorized by Local Act—"Contract for Good or Valuable Consideration"— Compulsory Church Rate Abolition Act*, 1868 (31 & 32 *Vict. c.* 109), *s.* 5—*Burial Board—Burial Fees—Fees by Law or Custom payable to Churchwardens or Trustees for Parochial Purposes—Burial Act*, 1852 (15 & 16 *Vict. c.* 85), *s.* 36.] By s. 5 of the Compulsory Church Rate Abolition Act, 1868, it is provided that "this Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied . . . upon any contract made, or for good or valuable consideration given":—*Held*, that the "contract made" or the "consideration given" must be found in or be gathered from the Act which authorizes the levying of the church rate.—Under the provisions of a local Act certain fees payable in respect of burials in the burial ground of a metropolitan parish were applicable to the purpose, amongst others, of the repair of the parish church.—By the Burial Act, 1852, the existing metropolitan parochial burial grounds were closed, and new burial grounds, under the management of burial boards, were provided. Sect. 34 of that Act empowered the burial board to fix and receive the fees in respect of interments in the new burial ground provided for the parish. By s. 36, "Where fees or any portions of fees payable on interments . . . in the burial ground of any parish for which a burial ground is provided . . . under this Act are by law or custom payable to the churchwardens . . . or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose . . . such fees or portion of fees shall be payable in the burial ground to be provided as aforesaid for such parish under this Act, and shall be received by the burial board and paid to the parties entitled to receive the same":—*Held*, that the repair of the parish church was a parochial purpose within the meaning of s. 36, and that the fees received by the burial board under s. 34 of the Act were applicable to the purpose of this repair. THE QUEEN *v.* VESTRY OF ST. MARYLEBONE [C. A. 771

ELECTION—Vote by proxy—Body corporate—Vote by shareholder by officer—Duties of returning officer—Judicial act 815
See THAMES.

ESTOPPEL—Warehouseman—Property in goods obtained by fraud—Jus tertii—Trover—Measure of damages - - 521
See BAILOR AND BAILEE.

—— Negligence—Bill of exchange—Alteration—Duty of acceptor - - 536
See BILL OF EXCHANGE.

EVIDENCE—*Admission—Separable Statements—Presumption of Continuance of Facts admitted.*] In an action for the price of goods supplied to a firm it was sought to charge W. as having been a partner in the firm at the date when the goods were supplied. The only evidence of his ever having been a partner was a letter written by him to a third person prior to the supply of the goods, in which he stated that he had ceased to be a partner some time previously:—*Held*, that there was evidence to go to the jury that W. was still a partner at the date when the goods were supplied. BROWN *v.* WREN BROTHERS - 390

—— Contributory negligence—Burden of proof
See NUISANCE. [199

EXECUTION—Partnership— Liabilities — Separate debt of partner—Judgment creditor—Foreign firm—Branch office in England - - - - - 737
See PARTNERSHIP.

EXECUTOR—Right of retainer—Poor law—Relief—Property of deceased pauper — Reimbursement of guardians - 59
See POOR LAW. 3.

FACTOR—Possession of goods under agreement to purchase—Hire and purchase agreement—Sale by hirer to bonâ fide purchaser without notice—Conviction of hirer for larceny as bailee - - 653
See SALE OF GOODS.

FACTORY ACTS—*Dangerous Machinery—Duty to Fence—Factory and Workshop Acts*, 1878 (41 & 42 *Vict. c.* 16), *s.* 5; 1891 (54 & 55 *Vict. c.* 75), *s.* 6.] By s. 5, sub-s. 3, of the Factory and Workshop Act, 1878, "Every part of the mill gearing" in a factory shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced.—By s. 6 of the Factory and Workshop Act, 1891, the words "all dangerous parts of the machinery and" shall be inserted in s. 5, sub-s. 3, of the Act of 1878 before the words "every part":

FACTORY ACTS—*continued.*

—*Held*, that the words "all dangerous parts of the machinery" in s. 6 of the later Act were not limited to such machinery as supplied or conveyed the motive power to the machines by which the industrial operations of the factory were immediately effected, but that those words applied to all the machinery in the factory. REDGRAVE *v.* LLOYD & SONS - - - - 876

FALSE PRETENCES — Indictment—Receiving goods knowing them to have been obtained by false pretences—Sufficiency of indictment without statement of nature of pretence - - - - 25
See CRIMINAL LAW. 5.

FISHERY ACTS — *Salmon and Freshwater — Fishery District—Secretary of State's Certificate —Definition of Limits—Tributary of River, what is.*] A Secretary of State's certificate, made under the Salmon Fishery Acts, 1861, 1876, defined the limits of the Severn Fishery District as including "so much of the River Severn and of all the tributaries of the said river" as was situate within certain specified counties:—*Held*, that a brook running into a river, which ran directly into the Severn, was a "tributary" of the Severn within the meaning of the certificate. EVANS *v.* OWENS - - - - - 237

FOOTWAY—Paving—Apportionment of expenses
See LOCAL GOVERNMENT. 4. [395

FOREIGN PAINTING—International copyright —Right of owner to sue without registration of copyright in England - 347
See INTERNATIONAL COPYRIGHT.

FOREIGNER — Bankruptcy — Jurisdiction — "Dwelling-house in England" - 151
See BANKRUPTCY. 2.

FRANCHISE—Parliament.
See PARLIAMENT.

FRAUDS, STATUTE OF—Agreement not to be performed within one year—Landlord and tenant - - - - 378
See LANDLORD AND TENANT. 8.

FREIGHT—Loss of—"Cancelling of charter"
See INSURANCE (MARINE). 2. [510

GAME—*Alienation of right to kill Ground Game — Occupier of Land — Contract — Validity — Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *ss.* 1, 2, 3.] The plaintiff, who was occupier of a farm with the sole right of taking game and rabbits on it, in 1889 agreed in writing to let to the defendant for an annual sum "the sole right of killing all winged game, hares, and rabbits" on the farm:—*Held*, that this agreement was not made void by s. 3 of the Ground Game Act, 1880. MORGAN *v.* JACKSON - - - - 885

GAMING—*Agreement by way of Wagering—Recovery of Deposit from Stakeholder—8 & 9 Vict. c.* 109—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.] The Gaming Act, 1892, s. 1, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, shall be null and void,

GAMING—*continued.*

and no action shall be brought or maintained to recover any such sum of money:—*Held*, that money deposited by the plaintiff with the defendant as stakeholder to abide the result of a race between the plaintiff and a third party was not money paid under or in respect of a wagering contract within the meaning of the Gaming Act, 1892, and therefore that the plaintiff, having demanded his deposit back from the defendant before it had been paid over by him to the third party, was entitled to maintain an action against the defendant for its recovery. O'SULLIVAN *v* THOMAS - - - - - 698

2. —— *Betting House Acts — Bets made by Letter or Telegram — "Resorting" to House — Criminal Law—Practice—Offence Punishable on Summary Conviction—Election of Accused to be tried by Jury—Adding Counts to Indictment for Offences not included in Summons—Betting House Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *s.* 25—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43)—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17—*Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35), *s.* 1.] Upon the trial of an indictment, under s. 1 of the Betting House Act, 1853, for keeping a house for the purpose of betting with persons resorting thereto, it is unnecessary to shew that such persons have physically resorted to the premises, the purpose for which the house is kept being that which is condemned by the section, and the offence may be proved by shewing that the house was opened and advertised as a betting-house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered in support of such an indictment, there must be evidence of a physical resorting, and it is not sufficient to shew that letters and telegrams were sent to the accused directing him to make bets with the senders; persons sending such letters and telegrams do not resort to the house within the meaning of the section.—Where an accused person, summoned before justices in respect of an offence triable summarily, elects, under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury, the subsequent procedure before justices is the same as that which is applicable to the case of indictable offences, and not that applicable to summary proceedings. The accused person may therefore be committed to take his trial in respect of any indictable offence disclosed by the depositions; and in cases not falling within the Vexatious Indictments Act, or in which the operation of that Act is limited by 30 & 31 Vict. c. 35, s. 1, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although the accused was not summoned before the justices in respect of such offence. THE QUEEN *v.* BROWN [C. C. R. 119

3. —— *Place used for Betting—"Betting with Persons resorting thereto" — Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.] The defendant was convicted on three counts, which charged him with using the bar of a beerhouse, on three

GAMING—*continued.*
different days, for the purpose of betting with persons resorting thereto, contrary to s. 1 of the Betting Act, 1853.—It was proved that on each of the three days the defendant was in the bar, and a number of persons came in, took slips of paper which were hanging on the wall, wrote on the slips the names of the horses they wished to back for races, wrapped up in the slips the money they staked, and handed the slips with the money enclosed to the defendant. Usually the defendant went outside, and received the slips and money on the doorstep of the house, but on one of the three days he received two slips, with money enclosed, in the bar:—*Held*, that there was evidence to go to the jury that the defendant had used the bar for the purpose of betting with persons resorting thereto on each of the three days, and he was rightly convicted. THE QUEEN *v.* WORTON - - C. C. R. 227

GIFT — Personal property — Mortgage debt—Possession not assumed by donee to the exclusion of benefit to donor - 99
See REVENUE.

GUARDIANS—Poor law - - - 662
See POOR LAW. 2.

HACKNEY CARRIAGE — Driver's licence—Defacement by proprietor — "Matter of complaint"—Evidence of damage 639
See METROPOLIS. 7.

—— Order to pay cab fare and costs—Non-payment—Imprisonment in default of sufficient distress - - - 1
See JUSTICES. 3.

HIGHWAY — *Driver leaving Cart unattended whilst "passing upon" Highway — Cart left Standing—Highways Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 78.] Sect. 78 of the Highways Act, 1835, which makes it an offence for the driver of any carriage to be at such distance from it "whilst it shall be passing upon such highway that he cannot have the direction and government of the horses or cattle drawing the same," applies where the driver leaves the carriage standing by the roadside. PHYTHIAN *v.* BAXENDALE - - - - - - 768

2. —— *Extraordinary Traffic — Person by whose Order Traffic is Conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.] The respondents contracted to deliver ballast for the construction of a railway, and arranged with several owners of traction engines the terms on which they would convey the ballast from the respondents' wharf to the place of delivery. From time to time when ballast was required the respondents arranged with one or other of the owners of the traction engines to haul it to the place of delivery. They exercised no control over the user of the engines, the weights carried, or the route followed. The carriage of the ballast caused extraordinary traffic whereby the road was damaged. A complaint by the authority liable to repair the road against the respondents to recover the expense of the repairs was dismissed by the justices. On a case stated:—*Held* (affirming the judgment of the Divisional Court), that the respondents were

HIGHWAY—*continued.*
liable under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as the persons by whose order such traffic, the aggregate amount of which had caused the damage, had been conducted. KENT COUNTY COUNCIL *v.* VIDLER [C. A. 448

3. —— *Repair — Extraordinary Expenses — Certificate of Surveyor—Inclusion of more than one Highway in Certificate—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.] A certificate of the surveyor to a highway board, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as to extraordinary expenses incurred upon highways in their district, is not bad by reason of the fact that it includes more than one highway, and does not particularize or describe the highways included; a separate certificate need not be given in respect of each highway. WIRRAL HIGHWAY BOARD *v.* NEWELL - - 827

—— Right of support—Subsidence caused by mining operations - - - 301
See LOCAL GOVERNMENT. 7.

HIRE AND PURCHASE AGREEMENT—Sale of goods—Possession of goods under agreement to purchase—Sale by hirer to bonâ fide purchaser without notice — Conviction of hirer for larceny as bailee
See SALE OF GOODS. [653

HOUSE—Part of a house separately occupied as a dwelling—Exclusive occupation of cubicle in dormitory — Parliament—Borough vote - - - 691
See PARLIAMENT.

HOUSE OF LORDS—Costs—Poor law—Guardians—Limitation of time for payment of debt - - - - - 662
See POOR LAW. 2.

HUSBAND AND WIFE—*Counter-claim by Married Woman—"Proceeding Instituted"—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.] By s. 2 of the Married Women's Property Act, 1893, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just":—*Held*, that a counter-claim in an action against a married woman was a "proceeding instituted" within the meaning of the above section, and that, the counter-claim having been dismissed, there was jurisdiction to order the plaintiff's costs thereof to be paid out of the defendant's life estate notwithstanding any restraint upon anticipation:—*Held*, further, that where an order had been made dismissing an application by the defendant, a married woman, with costs, the Court or a judge had power in a subsequent order appointing a receiver to direct that those costs should be paid out of property subject to a restraint on anticipation. HOOD BARRS *v.* CATHCART - - - - - 873

HUSBAND AND WIFE—*continued.*

2. —— *Separation—Covenant to pay Annuity—Deed without Trustee—Covenant by Wife not to molest, annoy, or interfere—Adultery by Wife—Action for Arrears of Annuity—Right of Wife to recover—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.] By a separation deed, executed by husband and wife alone, without a trustee, the husband covenanted to to pay an annuity to the wife, and she covenanted not to molest, annoy, or interfere with him. There was no *dum casta* clause.—In an action by the wife against the husband to recover arrears of the annuity:—*Held*, that the plaintiff could maintain the action, and her adultery, resulting in the birth of a child, afforded no defence. SWEET *v.* SWEET - - - - 12

—— Judgment against married woman—Death of husband—Personal liability - 328
See BANKRUPTCY. 8.

INCOME TAX—Exemption — Public library — Urban authority - - - 673
See REVENUE. 4.

—— Money received for fine on renewal of lease —Direction in will to invest in land—Temporary deposit in bank at interest—Claim of exemption—"Applied as productive capital" - - - 170
See REVENUE. 5.

—— Revenue—Company resident in the United Kingdom—Railway in foreign country —Trade carried on partly in United Kingdom, partly abroad—Profits earned abroad not remitted to United Kingdom
See REVENUE. 3. [580

—— Trade exercised within United Kingdom—Assessment in name of agent—"Factor, agent, or receiver having the receipt of profits or gains" - - - 71
See REVENUE. 6.

INDICTMENT — Pleading — Receiving goods knowing them to have been obtained by false pretences—Sufficiency of indictment without statement of nature of pretence - - - - 25
See CRIMINAL LAW. 5.

—— Libel—Sufficiency of indictment—Omission of averment that publication was "malicious" - - - 758
See CRIMINAL LAW. 2.

INFANT—Specific performance—Agreement for lease by two defendants—One of defendants an infant—Injunction - 683
See LANDLORD AND TENANT.

INJUNCTION—Arbitration—Action impeaching agreement to refer - - - 253
See ARBITRATION.

—— Specific performance—Agreement for lease by two defendants—One of defendants an infant - - - - 683
See LANDLORD AND TENANT.

INN—Licensing Acts - - - 616
See LICENSING ACTS. 2.

INSURANCE (MARINE)—*Sea Damage to part of Goods Insured—Cost of Examining undamaged Part—Liability of Underwriters.*] A cargo of galvanized iron, consisting of a number of cases each containing several sheets of iron, was insured by a policy that warranted the subject-matter of the insurance free from average under 3 per cent., and declared average to be recoverable on each package separately or on the whole. The insurance was from Bristol to London until safely delivered on board export vessels if so forwarded. Some of the iron was damaged during the voyage to London by perils insured against, and the whole was, on arrival in London, landed, unpacked and examined. The examination shewed that the iron in a number of the cases had been damaged to a considerable extent, but that the iron in the other cases was undamaged. The contents of cases in which any iron had been damaged were sold, and the rest of the iron was repacked and forwarded to its destination by the shippers, who claimed from the underwriters the whole expense arising from the unloading of the cargo for examination:—*Held* (affirming the judgment of Wills J.), that the underwriters were not liable to indemnify the assured in respect of the expenses incurred by them in relation to any part of the cargo other than those cases which contained iron that had been damaged by the perils insured against. J. LYSAGHT, LIMITED *v.* COLEMAN - C. A. 49

2. —— *Loss of Freight — "Cancelling of Charter"—Delay through Perils of Sea—Frustration of Adventure.*] A policy of insurance upon freight contained the provision "No claim arising from the cancelling of any charter . . . shall be allowed." The vessel on her way to the port of loading under a charterparty was so delayed by perils of the sea that the voyage contemplated by the charter became impossible; but no actual setting aside of the charter took place between the parties. In an action on the policy:—*Held*, that the charter had been cancelled within the meaning of the provision, and the insurers were not liable. IN RE AN ARBITRATION BETWEEN JAMIESON AND NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCIATION - - 510

3. —— *Policy, Construction of—Clause partly in Print and partly in Writing—Rejection of Words wholly inapplicable—Attachment of Policy.*] By a policy of marine insurance, partly in writing and partly in print, it was declared, in a part of the policy which was in writing, that the insurance was upon "freight of meat at and from Monte Video" to any ports in the River Plate, including the Boca, and thence to the United Kingdom, and that the underwriters should be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel. By a subsequent clause of the policy it was declared that the assurance should commence "upon the freight and goods or merchandize on board from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." The name "Monte Video" in this clause was in writing, the rest of the clause being in print. After the arrival of the ship at Monte Video on her outward voyage, she proceeded to the Boca, where a cargo of meat was ready for shipment; but her refrigerating

INSURANCE (MARINE)—*continued.*

machinery then broke down so completely as to render it necessary to abandon the design of loading the meat. At the date of the policy it was known to both underwriters and assured that meat never was and could not be loaded at Monte Video in consequence of the absence of appliances for freezing the meat at that port:—*Held* (reversing the decision of Wills J.), that, the words in the clause defining the commencement of the risk with regard to the loading of the goods being absolutely inapplicable under the circumstances of the case, they must be rejected, and therefore the policy attached, although no meat was ever loaded on board the ship. HYDARNES STEAMSHIP COMPANY *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY **C. A. 500**

4. —— "*Hull and Machinery*"—"*Warranted Uninsured*" — "*Honour*" *Policies* — "*Disbursements*"—*Infringement of Warranty.*] The plaintiff effected a time policy with the defendants on the hull and machinery of a steamship which was valued at 10,000*l.* The policy contained the proviso "5000*l.* warranted uninsured." The total policies effected by the plaintiff on hull and machinery amounted to 5000*l.* He had, however, further effected, by means of "honour" policies, insurances on "disbursements" to the extent of 2600*l.*, and, the ship having been lost within the insured period, the defendants refused payment on the ground that these policies infringed the warranty:—*Held*, that the "honour" policies, although void at law under 19 Geo. 2, c. 37, were effective to infringe such a warranty, but that since the policies were on "disbursements" they did not cover any part of the subject-matter insured by the policy on "hull and machinery," and therefore did not infringe the warranty. RODDICK *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY - - **836**

INTEREST — Disqualification —Justices—Membership of class in whose interest proceedings taken - - - **563**
See JUSTICES.

INTERNATIONAL COPYRIGHT — *Literary or Artistic Work produced in a Foreign Country—Infringement of Copyright in England—Right of Owner to Sue without Registration in England—Country where Painting first Produced—Publication of Painting—Country of Origin—Order in Council, November* 28, 1887, *adopting the Berne Convention of September* 5, 1887—*Fine Arts Copyright Act*, 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 4, 12—*International Copyright Act*, 1886 (49 *&* 50 *Vict. c.* 33), *ss.* 4, 11.] By s. 4 of the International Copyright Act, 1886, "Where an Order (in Council) respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the Order."—The Order in Council of November 28, 1887, adopting the Berne Convention of September 5, 1887, contains no provisions with respect to the registry and delivery of copies of works produced in a foreign country, and consequently registration under the Fine Arts Copyright Act, 1862, is not necessary to entitle the owner of the English

INTERNATIONAL COPYRIGHT—*continued.*

copyright in a foreign painting to sue for infringement.—*Hanfstaengl Art Publishing Co.* v. *Holloway* ([1893] 2 Q. B. 1) approved.—*Fishburn* v. *Hollingshead* ([1891] 2 Ch. 371) disapproved.—By s. 11 of the International Copyright Act, 1886, "The expression 'produced' means, as the case requires, published or made, or, performed or represented."—The word "published" is applicable to a painting, and the country where it is first published is the country of origin mentioned in article 2 of the Convention of Berne, so that compliance with the conditions and formalities prescribed by the law of the country where the painting is first published gives the owner the right to sue for infringement in this country. HANFSTAENGL *v.* AMERICAN TOBACCO COMPANY - - - - **C. A. 347**

JOINT CONTRACTOR—*Guarantee by two jointly—Cheque given in respect of, by one of Joint Contractors—Unsatisfied Judgment on Cheque—Action against Joint Contractor on Guarantee—Res Judicata.*] An unsatisfied judgment against one joint contractor, on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.—The defendant and T. jointly guaranteed to the plaintiff the payment of rent by a tenant of the plaintiff's. A half-year's rent being in arrear, T. gave the plaintiff his cheque for the amount. The plaintiff sued T. on the cheque, and recovered judgment, but such judgment was not satisfied. The plaintiff then sued the defendant on the guarantee:—*Held* (affirming the judgment of Wills J.), that, the causes of action upon the cheque and upon the guarantee not being the same, the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504) did not apply, and the judgment against T. afforded no defence to the action.—*Drake* v. *Mitchell* (3 East, 251) followed.—*Cambefort* v. *Chapman* (19 Q. B. D. 229) overruled. WEGG PROSSER *v.* EVANS - - **C. A. 108**

JUDGE—*Court of Record of Colony—Act done in exercise of Judicial Office—Malicious Motive — Immunity from Action.*] No action lies against a judge of the Supreme Court of a colony in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice. ANDERSON *v.* GORRIE **[C. A. 668**

JUDGMENT — Joint contractor — Guarantee cheque given for liability on—Unsatisfied judgment on cheque — Action against joint contractor on guarantee—Res judicata - - - **108**
See JOINT CONTRACTOR.

JUDGMENT DEBTOR—Examination—Conduct money - - - - **16**
See PRACTICE. 7.

JURISDICTION — Bankruptcy — Foreigner — "Dwelling-house in England" - **151**
See BANKRUPTCY. 12.

—— County court—Remitted action—Counterclaim for unliquidated damages - **92**
See COUNTY COURT. 2.

JUSTICES—*Interest—Disqualification—Membership of Class in whose Interest Proceedings taken—Qualified Pilot—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 361.] By s. 361 of the Merchant Shipping Act, 1854, an unqualified pilot, assuming or continuing in the charge of any ship after a qualified pilot has offered to take charge of her, is liable to a penalty recoverable before a court of summary jurisdiction:—*Held*, that, upon the hearing of a summons under the above section, a qualified pilot, belonging to the pilotage district within which the offence was committed, has, by reason of his membership of the class in whose interest the proceedings are taken, such an interest as will disqualify him from acting as a justice, even though by reason of the peculiar nature of his employment as a pilot he is not brought into competition with unqualified pilots, and has consequently no personal interest in the conviction. THE QUEEN *v.* HUGGINS 563

2. —— *Practice—Appeal—Court of Summary Jurisdiction—Appeal to Quarter Sessions—Recognisance—Court before which recognisance to be entered into—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 3.] By the Summary Jurisdiction Act, 1879, s. 31, sub-s. 3, the appellant from an order of a court of summary jurisdiction shall "enter into a recognisance before a court of summary jurisdiction" to prosecute such appeal:—*Held*, that the recognisance may be entered into before any court of summary jurisdiction, whether acting for the same county as the Court from whose order the appeal is brought, or not. THE QUEEN *v.* JUSTICES OF DURHAM - - - - - 801

3. —— *Summary Jurisdiction—Procedure—Complaint—Information—Order to Pay Cab Fare and Costs—Distress—Imprisonment—"Sum of Money claimed to be due"—Summary Jurisdiction Acts*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35; 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 5, *and Schedule—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 66—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 145.] By s. 66 of the Towns Police Clauses Act, 1847, if any person refuse to pay on demand to any driver of a hackney carriage the fare allowed by the Act, or by-laws made thereunder, such fare may, together with costs, be recovered before a justice as a penalty.—Where justices, on an information in writing, made an order that the defendant should pay a fare and costs, and that in case of non-payment he should be imprisoned in default of a sufficient distress:—*Held*, that the order was bad, because the fare was "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879, and was therefore recoverable only in the manner in which "civil debts" are recoverable in a court of summary jurisdiction under s. 35 of that Act. THE QUEEN *v.* KERSWILL - 1

—— Borough—Clerk—Salary—County council *See* LOCAL GOVERNMENT. 2. [43

—— Quarter sessions—Appeal against refusal of licence—Jurisdiction as to costs of appeal - - - - 616
See LICENSING ACTS. 2.

JUSTICES—*continued.*

—— Quarter sessions—Costs of appeal—Taxation out of sessions—Consent—Jurisdiction *See* POOR LAW. [357

LANDLORD AND TENANT—*Agreement for Lease by Two Defendants—One of Defendants an Infant—Specific Performance—Injunction.*] The defendants, an infant and his sister, agreed by their agent to grant the plaintiff a lease of premises in which they were jointly interested. The plaintiff brought an action for specific performance of the agreement, and applied for an injunction to restrain the defendants till after the trial of the action from leasing the premises to any other person:—*Held*, that an injunction ought to be granted only where a case was made out for specific performance; that one of the defendants being an infant the plaintiff was not entitled to specific performance against both of them; nor against the sister as to her interest in the absence of any proof of misrepresentation or misconduct on her part; and that he was therefore not entitled to an injunction. LUMLEY *v.* RAVENSCROFT [C. A. 683

2. —— *Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6, 7, 24—*Compensation for Improvements—Arbitration—Counter-Notice of Claim by Landlord—Award to Landlord of amount in excess of Tenant's Claim—Enforcement of Payment—County Court—Jurisdiction—Prohibition.*] In an arbitration under the Agricultural Holdings (England) Act, 1883, where a greater amount is awarded to the landlord in respect of waste and breaches of covenant committed by the tenant than is awarded to the tenant as compensation for improvements, the landlord cannot recover the balance under the procedure given by the Act. IN RE HOLMES AND FORMBY [174

3. —— *County Court—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *Appointment of Referee under—Jurisdiction of Registrar—County Court Rules*, 1889, *Order* XL., *r.* 7—*Costs.*] The power given to the county court by s. 9, sub-s. 6, of the Agricultural Holdings Act, 1883, to appoint a referee to act on behalf of a party to a reference under that Act is by s. 11 to be exerciseable by the judge, unless the parties consent to its exercise by the registrar; so much, therefore, of Order XL., r. 7, of the County Court Rules, 1889, as provides that an application to appoint such referee may be disposed of by the registrar unless one of the parties gives a written notice of his desire that it be heard before the judge is ultra vires and bad.—A referee or umpire making an award under the Agricultural Holdings Act, 1883, cannot order costs to be paid as between solicitor and client. IN RE AN ARBITRATION BETWEEN GRIFFITHS AND MORRIS - - 866

4. —— *Distress—New Tenancy*—8 *Anne, c.* 14, *ss.* 6, 7.] The right to distrain after the expiration of a tenancy given by 8 Anne, c. 14, ss. 6, 7, does not apply where the tenant remains in possession of part of the demised premises under a new tenancy created by agreement.—*Nuttall* v. *Staunton* (4 B. & C. 51) distinguished. WILKINSON *v.* PEEL - - - - 516

LANDLORD AND TENANT—*continued.*

5. —— *Lease—Proviso to determine by Notice—Sufficiency of Notice.*] The plaintiff sued for a declaration that the term of years created by a lease, under which he was tenant to the defendant, had been determined by notice.—The lease was for twenty-one years from Christmas, 1887, subject to a proviso "that if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year," the lease should determine.—On October 21, 1893, the plaintiff wrote to the defendant, "I see that my first seven years will be determined on December 25, 1894 . . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt."—Negotiations for a reduction of rent followed, and continued until within six months of the termination of the first seven years of the term, when the defendant refused any reduction:—*Held*, that the letter of October 21, 1893, was sufficient to determine the term created by the lease, and the plaintiff was entitled to a declaration that the term had been determined. BURY *v.* THOMPSON - - - - - 231

6. —— *Lease—Proviso to determine by Notice—Sufficiency of Notice.*] The plaintiff sued for a declaration that the term of years created by a lease, under which he was tenant to the defendant, had been determined by notice.—The lease was for twenty-one years from Christmas, 1887, subject to a proviso "that if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term, and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year," the lease should determine.—On October 21, 1893, the plaintiff wrote to the defendant, "I see that my first seven years will be determined on December 25, 1894 . . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt."—Negotiations for a reduction of rent followed, and continued until within six months of the termination of the first seven years of the term, when the defendant refused any reduction:—*Held* (affirming the judgment of the Divisional Court, [1895] 1 Q. B. 231), that the letter of October 21, 1893, was a good notice to determine the term created by the lease. BURY *v.* THOMPSON - - - - - - C. A. 696

7. —— *Sub-lease—Implied Covenant for Title—Implied Covenant for Quiet Enjoyment—Duration of Covenant.*] The defendants being possessed of a term of years in a house, of which term there were eight and a half years then unexpired, by indenture sub-let the premises to the plaintiffs for a term of ten and a half years, acting under a mistake, but in good faith. The sub-lease did not contain any express covenants either for title or for quiet enjoyment, nor did

LANDLORD AND TENANT—*continued.*

the words of letting include the word "demise." The plaintiffs entered and occupied the premises until the expiry of the eight and a half years, when they were evicted by the defendants' superior landlord. The plaintiffs having brought an action for damages for breach of implied covenants for title and for quiet enjoyment:—*Held*, that in the absence of the word "demise" the law would not imply a covenant for title as distinguished from a covenant for quiet enjoyment; and that, although the law would imply a covenant for quiet enjoyment, such implied covenant would not enure beyond the termination of the defendants' own estate, and that consequently the plaintiffs could not recover. BAYNES & CO. *v.* LLOYD & SONS - - 820

8. —— *Yearly Tenancy — Notice to Quit—Commencement of Tenancy—"On" or "From" the Day specified—Agreement not to be performed within a Year—Statute of Frauds, s. 4.*] By an agreement in writing the plaintiff agreed to let a house to the defendant as yearly tenant "commencing on the 19th of May, 1890," an apportioned part of the rent up to June 24 next to be paid at once, and the future rent to be paid quarterly in advance on the usual quarter-days. On November 17, 1893, the plaintiff gave the defendant notice to quit on May 19 following; and subsequently brought an action to recover possession of the premises. The defendant disputed the validity of the notice to quit, and also set up an oral agreement made in December, 1892, that the tenancy of the house should not be terminated till November, 1895. The plaintiff in reply pleaded the 4th section of the Statute of Frauds:—*Held*, that the tenancy must be taken to have commenced on May 19, and not on June 24; that the day mentioned in a demise as the commencement of the tenancy is the first day of the term, whether the expression used be "on" the day specified or "from" that day; and consequently that a notice to quit on May 18 would have been good. But *held* (A. L. Smith L.J. doubting), that the notice to quit on May 19 was also good, that being the anniversary of the commencement of the term:—*Held*, also, that the oral agreement to continue the tenancy beyond a year was invalid under the Statute of Frauds, there being no fresh demise. SIDEBOTHAM *v.* HOLLAND - - - C. A. 378

—— Distress—Attornment clause—Mortgage—Death of mortgagor - - 375
See MORTGAGE.

—— Distress—"Rent accrued due prior to date of order of adjudication" - - 844
See BANKRUPTCY. 11.

—— Ground Game Act, 1880 - - 885
See GAME.

LARCENY—Demanding money with menaces
See CRIMINAL LAW. [706

LEASE—Proviso to determine by notice—Sufficiency of notice - - 231, 696
See LANDLORD AND TENANT. 5, 6.

LIBEL—Indictment—Sufficiency — Omission of averment that publication was "malicious" - - - - 758
See CRIMINAL LAW. 2.

LIBEL—*continued.*

—— Newspaper—Payment of money into Court with defence of apology — Verdict of smaller amount—Payment out of Court to defendant - - - **211, n.**
See DEFAMATION. 2.

—— Privileged occasion — Constable—Publication ordered by justices - - **888**
See DEFAMATION.

LIBRARY—Public library—Income tax—Exemption - - - - - **673**
See REVENUE. 4.

LICENCE—Hackney carriage—Metropolis **639**
See METROPOLIS. 7.

LICENSING ACTS—*Justices—Quarter Sessions—Appeal against Refusal of Licence—Jurisdiction as to Costs of Appeal—Judicial Function—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Summary Jurisdiction Acts*, 1848, 1879, 1884 (11 *& 12 Vict. c.* 43, *s.* 27; 42 *& 43 Vict. c.* 49, *ss.* 31, 55; 47 *& 48 Vict. c.* 43, *s.* 6)—*Quarter Sessions Act*, 1849 (12 *& 13 Vict. c.* 45), *ss.* 5, 6.] By the Alehouse Act, 1828, s. 29, where an appeal from an order of any justice under that Act is dismissed, "it shall be lawful for the Court to whom such appeal shall have been made . . . . and such Court is hereby required to adjudge and order" that the appellants shall pay costs to the justice. By the Summary Jurisdiction Acts, 1848, 1879, and 1884, and the Quarter Sessions Act, 1849, other provisions are made relating to costs of appeals, and all Acts inconsistent with the Summary Jurisdiction Act, 1879, are repealed. An appeal against the refusal of an application for a licence under the Alehouse Act, 1828, was dismissed by quarter sessions; but the Court refused to order the appellant to pay the costs of the respondent justices. On an application for a mandamus commanding the justices in quarter sessions to hear and determine the application for an order for payment of costs:—*Held*, that, in deciding that the statutes gave a discretion as to costs, and in refusing costs, the justices in quarter sessions were exercising a judicial, and not a ministerial, function, and their determination could not be reviewed by mandamus. THE QUEEN *v.* JUSTICES OF LONDON - - - **214**

2. —— *Refusal to renew Licence—Appeal to Quarter Sessions — Costs of Licensing Justices opposing Appeal—Discretion of Quarter Sessions — Mandamus — Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Summary Jurisdiction Acts*, 1848, 1879, 1884 (11 *& 12 Vict. c.* 43, *s.* 27; 42 *& 43 Vict. c.* 49, *ss.* 31, 32, 55; 47 *& 48 Vict. c.* 43, *s.* 6) —*Quarter Sessions Act*, 1849 (12 *& 13 Vict. c.* 45), *ss.* 5, 6—*Interpretation Act*, 1889 (52 *& 53 Vict. c.* 63), *s.* 13, *sub-s.* 11.] By the Alehouse Act, 1828, s. 29, where an appeal from an order of any justice under that Act is dismissed, "it shall be lawful for the Court to whom such appeal shall have been made . . . . and such Court is hereby required to adjudge and order" that the appellant shall pay to the justices "such sum by way of costs as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal."—By the Summary Jurisdiction Acts, 1848, 1879, and 1884, and the Quarter Sessions Act, 1849, other provisions are made relating to costs of appeals, and all Acts inconsistent with the Summary Jurisdiction Act, 1879, are repealed:—*Held*, that, as regards an appeal against the refusal to renew a licence, the above provision of s. 29 has not been repealed by subsequent legislation, but that it does not apply to the costs of justices who make themselves "parties" to an appeal, within the meaning of s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, by taking an active part in opposing the appeal:—*Held*, further, that when an appeal is dismissed the Court of quarter sessions has a discretion as to the costs of justices who thus make themselves "parties" to the appeal, and that, if they have exercised their discretion by refusing to give the costs of the appeal to licensing justices, the High Court cannot interfere by mandamus. —Decision of Queen's Bench Division, [1895] 1 Q. B. 214, affirmed. THE QUEEN *v.* JUSTICES OF LONDON - - - - **C. A. 616**

3. —— *Supplying Liquor to a Constable on Duty—Knowledge of Licensed Victualler—Mens rea—Licensing Act*, 1872 (35 *& 36 Vict. c.* 94), *s.* 16, *sub-s.* 2.] Sect. 16, sub-s. 2, of the Licensing Act, 1872, which prohibits a licensed victualler from supplying liquor to a police constable while on duty, does not apply where the licensed victualler bonâ fide believes that the police constable is off duty. SHERRAS *v.* DE RUTZEN - **918**

LIGHTERMAN — Qualification — Thames Conservancy By-laws - - - **793**
See WATERMEN'S AND LIGHTERMEN'S AMENDMENT ACT, 1859.

LIMITATIONS—Poor law—Guardians—Limitation of time for payment of debt—"Commencement of proceedings before competent authority" - - - **357**
See POOR LAW.

—— Poor law—Guardians—Limitation of time for payment of debt—Costs—Judgment of House of Lords for - - **662**
See POOR LAW. 2.

LOCAL GOVERNMENT — *Bye-law — County Council—Validity—Sale of Coal—Delivery from Vehicle—Requisition to provide and carry Weighing Instrument—Weights and Measures Act*, 1889 (52 *& 53 Vict. c.* 21), *s.* 28.] By the Weights and Measures Act, 1889, s. 28, local authorities may make bye-laws requiring a weighing instrument to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.—A county council made a bye-law that "Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle, shall carry therewith a correct and stamped weighing machine of the form approved by the county council, and such person shall reweigh the coal upon being requested to do so."—A coal merchant was summoned for conveying coal for delivery from a vehicle to a purchaser without a weighing machine, contrary to the bye-law. He had ordered the carman to leave the scales and weights on the wharf:—*Held*, on a case stated by justices,

LOCAL GOVERNMENT—*continued.*
that the provision in the bye-law, requiring that a weighing machine should be provided and carried, was warranted by the terms of the statute, and was valid, and there ought to be a conviction. KENT COUNTY COUNCIL *v.* HUMPHREY 903

2. —— *County Council — County Fund — Borough—Clerks to Borough Justices—Salaries—Fees — "Petty Sessional Divisions" — 12 & 13 Vict. c.* 18, *s.* 1—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 140—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 84.] Sect. 84 of the Local Government Act, 1888, has imposed upon a county council the duty of paying the salary of the clerk to the justices of a borough which is within the administrative county, and has a population under 10,000 and a separate commission of the peace; and all fees and costs payable to such clerk, which are not excluded in the fixing of his salary, should be paid into the county fund. *In re* COUNTY COUNCIL OF HEREFORDSHIRE AND TOWN COUNCIL OF BOROUGH OF LEOMINSTER, AND *In re* LOCAL GOVERNMENT ACT, 1888 - - - - - - 43

3. —— *Local Authority—Drain—Single Drain connecting different Houses with Public Sewer—Liability to Repair—Effect of Notice by Local Authority to Owner to Repair—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.] By s. 41 of the Public Health Act, 1875, a local authority, on the application of any person stating that a drain on premises within their district is a nuisance or injurious to health, may, if upon examination such drain appear to be in a bad condition or to require alteration or amendment, give notice in writing to the owner or occupier of the premises requiring him to do the necessary works; and, if such notice be not complied with, the local authority may themselves do the work and recover the expenses from the owner.—By s. 19 of the Public Health Acts Amendment Act, 1890 (which may be adopted by local authorities), where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875, and the local authority may recover any expenses incurred by them under the powers conferred by that section from the owners of the houses; and, for the purpose of s. 19, "drain" includes a drain used for the drainage of more than one building.—Two houses belonging to different owners were connected with a public sewer by a single private drain. The local authority of the district, who had adopted the Act of 1890, served upon one of the owners a notice, under the Public Health Act, 1875, addressed to both, requiring them to abate a nuisance arising from the drain by doing certain works, and stating that, unless the nuisance were abated, the local authority would proceed to enforce the abatement and to recover costs and penalties. The owner upon whom such notice was served accordingly did the work, and brought an action against the local authority to recover the cost as money paid by her at their request:—*Held,* that the notice given by the defendants to the plaintiff was not a request to do the work which would

LOCAL GOVERNMENT—*continued.*
support the action; that no such request could be implied, because the defendants were not themselves compellable to do the work, and under ss. 41 of the Act of 1875 and 19 of the Act of 1890 could have compelled the owners to do it, and therefore that the defendants were not liable. SELF *v.* HOVE COMMISSIONERS - - 685

4. —— *Private Street Works—Footway—Apportionment of Expenses—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *s.* 10.] By the Private Street Works Act, 1892, s. 10: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises."—A local board, acting as an urban sanitary authority, resolved to execute certain private street works in a street which had buildings on the north side only, and was bounded on the south side chiefly by land of which the local board were owners. The works comprised the making up of the roadway, and the paving and kerbing of a footpath on the north side only: no footpath was made on the south side. The surveyor of the local board made a provisional apportionment, by which the expenses of paving and kerbing the footpath were apportioned among the owners of premises abutting on the north side only, all the other expenses of the proposed works being apportioned among the owners of premises abutting on both sides of the street, including the local board, as the owners of land on the south side:—*Held,* that the provisional apportionment of the expenses of the footpath was wrong, and that they were properly apportionable among the owners of premises fronting, adjoining, or abutting on both sides of the street. CLACTON LOCAL BOARD *v.* YOUNG & SONS - - - 395

5. —— *Sewers — "Single Private Drain" — Drainage of two or more Premises—Local Act—Public Health Acts,* 1848 (11 *&* 12 *Vict. c.* 63); 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 13, 15, 41; 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.] By a system of drainage established before 1848, a single brick drain on the respondent's premises conveyed the drainage of his house, and of other houses belonging to different owners, into an adjacent ditch. In 1853 the local authority of the district substituted for the ditch a public sewer, and the brick drain was connected with it. In 1887 a local Act was passed, which provided that where two or more houses or premises were connected with a single private drain which conveyed their sewage into a public sewer, the local authority should have all the powers conferred by s. 41 of the Public Health Act, 1875. The local authority had adopted the Public Health Acts Amendment Act, 1890, s. 19, which contains provisions with respect to "single private drains" similar to those in the local Act:—*Held,* that the brick drain was not a "single private drain" within the meaning of the local Act or of s. 19 of the Public Health Act of 1890, because on the passing of the Public Health Act, 1848, such drain became, and had ever since been, a sewer vested in the local

LOCAL GOVERNMENT—*continued.*
authority and repairable by them, and therefore that they were not entitled to exercise against the respondent the powers conferred upon them by s. 41 of the Public Health Act, 1875. *Self* v. *Hove Commissioners* ([1895] 1 Q. B. 685) discussed. HILL *v.* HAIR - - - - - 906

6. —— *Streets—By-Laws—Laying out New Street—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.] Where the owner of a strip of land by the side of a lane which ran into a road began to build on a portion of his land a house fronting to the road, the side of which abutted on the lane, and there was nothing to shew any intention on his part of building other houses along the lane on the remainder of his land:—*Held*, that he was not laying out a new street along the lane within the meaning of by-laws with respect to the construction of new streets made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157. ST. GEORGE'S LOCAL BOARD *v.* BALLARD C. A. 702

7. —— *Urban Sanitary Authority—Highway—Subsidence caused by Mining Operations—Right of Support—Absence of appreciable Damage—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 27.] A railway company constructed a railway on the level across a highway in the district of which the relators were the urban sanitary authority. Subsequently the defendants worked coal mines in a proper and usual manner beneath the highway, with the result that a gradual and uniform subsidence to the extent of about ten feet vertically took place of the highway, railway, and surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway company placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway:—*Held*, in an action against the defendants for damages for the obstruction to the highway, that the defendants were not liable:—*Held*, also, per Collins J., that, assuming the highway to be repairable by the inhabitants at large, and therefore vested in the relators under s. 149 of the Public Health Act, 1875, the subsidence of the highway having been substantial, the relators, notwithstanding that they had suffered no appreciable damage by reason of such subsidence, were entitled to judgment with nominal damages for the injury to their proprietary right. *Smith* v. *Thackerah* (Law Rep. 1 C. P. 564) considered. ATTORNEY GENERAL ON THE RELATION OF LOCAL BOARD OF BROWNHILLS DISTRICT AND LOCAL BOARD OF BROWNHILLS DISTRICT *v.* CONDUIT COLLIERY COMPANY - - - - - 301

8. —— *Nuisance—Offensive Trade—Notice to Abate—Condition Precedent to Complaint—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 2, 4, 21.] Sect. 4 of the Public Health (London) Act, 1891, which provides that the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, shall serve a notice on the person responsible for the nuisance requiring him to abate it, applies only to the classes of nuisances enumerated in s. 2, and not to the nuisances arising from offensive trades dealt with by s. 21,

LOCAL GOVERNMENT—*continued.*
and the service of such a notice is not a condition precedent to the jurisdiction of the magistrate to hear a complaint under the latter section. BIRD *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON [912

9. —— *Police—Cost of Pay and Clothing—Borough maintaining Separate Police Force—Constables added from another Force—Contribution by County Council—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-s.* 2 (*j*)—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 25.] A borough which maintains a separate police force is entitled to be paid by the county council, under s. 24, sub-s. 2 (*j*), of the Local Government Act, 1888, one-half of the cost of the pay and clothing of extra police temporarily added from another police force under s. 25 of the Police Act, 1890, and paid for by agreement under that Act. THE QUEEN ON THE PROSECUTION OF MAYOR, &C., OF ROTHERHAM *v.* COUNTY COUNCIL OF WEST RIDING OF YORKSHIRE - - - - C. A. 805

MACHINERY — Coal mine — Examination—Report of result of Examination - 9
See MINE.

—— Duty to Fence—Factory Acts - 876
See FACTORY ACTS.

MAINTENANCE OF SUIT—*Action for Libel—Reflection on Character of Person other than Plaintiff—Common Interest.*] In order to justify maintenance by one person of the suit of another, there must either be a common interest recognised by the law in a matter at issue in the suit, or the case must fall within one of the specific exceptions from the law against maintenance established by the authorities. The defendant, being interested in the sale of certain electrical appliances for the treatment of disease, employed one T. as an expert to report thereon. T. reported favourably on the appliances. The plaintiffs, the proprietors of a newspaper, subsequently published an article commenting adversely upon T.'s report and the appliances in question, and casting reflections on T.'s qualifications as an expert, and on his conduct and that of the defendant in connection with the report and the sale of such appliances. T. brought an action for libel against the plaintiffs in respect of this article at the instigation of the defendant, who found money for the purposes of the action. The action resulted in a verdict and judgment for the defendants therein, the present plaintiffs, who thereupon sued the defendant for maintenance, claiming as damages the costs they had incurred in defending the action for libel, which T. was unable to pay:—*Held*, that the action was maintainable on the ground that the defendant had no common interest with T. in the action for libel, and therefore was not entitled to maintain him in bringing and prosecuting that action. ALABASTER *v.* HARNESS - - - - C. A. 339

MANDAMUS—Justices—Quarter sessions—Appeal against refusal of licence—Costs of justices opposing appeal—Discretion
See LICENSING ACTS. 1, 2. [214, 616

MANDAMUS—*continued.*

—— Building society—Neglect to appoint arbitrators - - - - 246
See BUILDING SOCIETY.

MARGARINE—Adulteration—Sample—Purchase for analysis—Contemporaneous admission of offence by seller—Notification to seller—Condition precedent to prosecution - - - - - 219
See ADULTERATION.

MARRIED WOMAN—Action against—Counterclaim—"Proceeding instituted" - 873
See HUSBAND AND WIFE.

—— Judgment against married woman—Death of husband—Personal liability - 328
See BANKRUPTCY. 8.

—— Separation deed—Covenant by husband to pay annuity—Deed without trustee—Covenant by wife not to molest, annoy, or interfere—Adultery by wife—Action for arrears of annuity - - 12
See HUSBAND AND WIFE. 2.

MASTER AND SERVANT—*Criminal Act done by Servant in course of his Employment—Responsibility of Master—Conviction of Servant—Release from Civil Proceedings for the same Cause—Effect on Master's Liability—The Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 45.] The defendant employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in the plaintiff's house, and, on one of the instalments being in arrear, went to the house and removed the furniture. While so doing he assaulted the plaintiff. For this assault he was summoned, convicted and fined, and he paid the fine. In an action against the defendant in respect of the assault the jury found that the manager committed the assault in the course of his employment:—*Held*, that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant, and that the release of the servant, under 24 & 25 Vict. c. 100, s. 45, from civil proceedings for the assault, did not release the defendant from liability. DYER *v.* MUNDAY - - - - C. A. 742

2. —— *Employment of Young Person in Shop—Non-exhibition of Statutory Notice in Shop—Shop Hours Act*, 1892 (55 & 56 *Vict. c.* 62), *ss.* 3, 4, 5.] By s. 3 of the Shop Hours Act, 1892, no young person is to be employed in or about a shop for more than seventy-four hours in any one week. Sect. 4 provides for the exhibition by the employer in a conspicuous place in his shop of a notice referring to the provisions of the Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop; the section does not provide a penalty for an omission to comply with its requirements. By s. 5, when any young person is employed in or about a shop contrary to the provisions of the Act, the employer is made liable to a fine not exceeding one pound for each person so employed.—The respondent, who had employed a young person in a shop in which the notice required by s. 4 was not exhibited, but had not

MASTER AND SERVANT—*continued.*

employed her for more than the lawful number of hours, was summoned before justices for having employed a young person in or about a shop contrary to the provisions of the Shop Hours Act, 1892, by reason of having employed her in a shop where the notice required by s. 4 was not exhibited:—*Held*, that the provisions of s. 5 could not be read into s. 4, and that the mere omission to exhibit the statutory notice in the shop did not render the respondent liable to the penalty imposed by s. 5 for employing a young person in a shop contrary to the provisions of the Act. HAMMOND *v.* PULSFORD - - - 223

3. —— *Extent of Servant's Authority—Sudden Emergency—Implied Authority to employ Substitute.*] A servant has an implied authority in cases of sudden emergency to appoint another person to act as a servant on his master's behalf.—While the defendants' omnibus was being driven by the defendants' servant, a policeman, being of opinion that the driver was drunk, ordered him to discontinue driving. The driver and the conductor of the omnibus thereupon authorized a third person, who happened to be passing by, to drive the omnibus home on their masters' behalf. That person while so driving the omnibus home negligently drove over the plaintiff and injured him:—*Held*, that the defendants were liable. GWILLIAM *v.* TWIST - - - - 557

METROPOLIS—*Management Acts—"Drain"—"Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.] The appellant was owner of buildings, consisting of forty-six sets of apartments, divided into two blocks separated by a causeway twenty feet wide, which opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway; the only access to the other being from the thoroughfare. In the causeway was a dust-bin for the common use of the occupiers of both blocks. The premises were drained by means of branch drains running from the sets of apartments into a main drain which ran into a sewer within one hundred feet of the blocks:—*Held*, that the main drain was "used for the drainage of premises within the same curtilage," and was therefore a "drain," and not a "sewer," within the meaning of s. 250 of the Metropolis Local Management Act, 1855; so that the appellant was liable to pay the expenses of works of alteration and amendment done to such drain by the vestry of the parish. PILBROW *v.* VESTRY OF ST. LEONARD, SHOREDITCH - - - 33

2. —— *Management Acts—"Drain"—"Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.] Two blocks of buildings, belonging to the same owner and containing forty-six sets of apartments, were separated by a causeway or yard twenty feet wide, of which one end was closed by a wall and the other opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway. The only access to the other block was from the public thoroughfare. The premises were drained by means of branch drains running from the sets of apartments into a main drain

METROPOLIS—*continued.*

which ran under the causeway and communicated with a sewer. The premises were so constructed as to be enclosed by continuous boundary walls, with the exception of the opening from the causeway into the thoroughfare:—*Held*, by Lord Esher M.R. and Lopes L.J. (Rigby L.J. dissenting), that, having regard to their construction, the two blocks of buildings were "premises within the same curtilage" within the meaning of the 250th section of the Metropolis Management Act, 1855, and therefore the main drain used for their drainage was a "drain" and not a "sewer" for the purposes of that Act.—By Rigby L.J.: There could not be a "curtilage" common to two messuages; and the two buildings, being separate and independent buildings, could not be "premises within the same curtilage" within the meaning of the section. PILBROW *v.* VESTRY OF ST. LEONARD, SHOREDITCH [C. A. 433

3. —— *Management Acts — "Drain" — "Sewer"—Liability to Repair—"Premises within the same Curtilage"—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.] The defendant was the owner of an arcade consisting of a central passage, with a number of houses and shops on either side, the whole being on the property of the defendant, and there being no right of way along the passage, which was roofed, and could be closed by gates placed at each end. The drainage of the arcade was by means of a construction which ran down the central passage to a main sewer outside, receiving in its course the drainage of the houses. In an action brought to determine whether the defendant was liable to keep the central construction in repair:—*Held* (affirming the judgment of the Queen's Bench Division), that the central construction was not a "drain of and used for the drainage of one building only, or premises within the same curtilage," and was therefore a "sewer" within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and vested in and to be kept in repair and maintained by the vestry. VESTRY OF ST. MARTIN-IN-THE-FIELDS *v.* BIRD - - - - - C. A. 428

4. —— *Management Acts—General Line of Buildings—What amounts to a "Building Structure or Erection"—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.] The question whether a wall is a "building structure or erection" within the meaning of s. 75 of the Metropolis Local Management Act, 1862, depends upon the height of the wall and the purpose for which it was built.—The forecourt of a house in a street in the metropolis had for many years been bounded on the side next the street by a dwarf wall between two and three feet high. The owner of the premises pulled down the dwarf wall and built on its site a wall eleven feet high, which was intended to be used for the purpose of exhibiting advertisements on it, but was also intended to serve as a boundary wall to the forecourt. The new wall was beyond the general line of buildings in the street, and was erected without the consent of the London County Council:—*Held*, that the original dwarf wall was not a "building structure or erection" within

METROPOLIS—*continued.*

the meaning of s. 75, and that so long as it existed the site on which it stood was to be regarded as vacant land for the purposes of the section; but that the substituted wall was a "building structure or erection" within the meaning of the section, and that there was consequently jurisdiction to order its demolition. LAVY *v.* LONDON COUNTY COUNCIL - - 915

5. —— *Management Acts — Streets — Paving Expenses—Lease held by Vestry—Trust for Enjoyment by the Public—"Owner"—Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *ss.* 3, 5—18 & 19 *Vict. c.* 120, *s.* 250—53 & 54 *Vict. c.* 54.] An open space in a square, the roads in which were streets within the meaning of the Metropolis Management Acts, was acquired by a vestry, under the Metropolitan Open Spaces Act, 1881, by assignment of a lease, under which the vestry held in trust to allow the enjoyment by the public of the open space. The assignment contained a covenant by the vestry that the land should be held and used for the purposes of a public garden, pleasure ground, or open space, and, on failure so to use it, to reassign. The owners of houses in the square refused to pay the amount apportioned on them in respect of the expenses of flagging the footway of one of the roads, on the ground that the apportionment was bad, because the vestry had not been charged, as owners of the open space, with any proportion of the expenses:—*Held*, that the vestry was the "owner" of the open space, within the meaning of the Metropolis Management Acts, and therefore the apportionment was bad. VESTRY OF ST. MARY, ISLINGTON *v.* COBBETT - - 369

6. —— *Management Acts—Vestry—Compulsory Taking of Land—Assessment of Compensation by Jury—Owner's Costs — Michael Angelo Taylor' Act* (57 *Geo.* 3, *c. xxix.*)—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 73.] Where land has been taken compulsorily, under Michael Taylor's Act, by the vestry of a metropolitan parish for the purpose of widening a street, and the owner's compensation has been assessed by a jury, he is not entitled to be paid by the vestry his costs of the trial. THE QUEEN *v.* JUSTICES OF LONDON - - - - - 881

7. —— *Public Carriage Acts—Driver's Licence—Defacement by Proprietor—"Matter of Complaint"—Evidence of Damage—Hackney Carriage Act*, 1843 (6 & 7 *Vict. c.* 86), *ss.* 8, 22.] By s. 8 of the Hackney Carriage Act, 1843 (6 & 7 Vict. c. 86), licences are to be granted to the driver of every hackney carriage, and every proprietor of a hackney carriage employing the driver named in the licence is to enter upon the licence the days on which the driver entered and quitted his service respectively.—The foreman of a cab proprietor, in making the entries required by the above section, inserted in the licence one date of entering the proprietor's service and two dates of quitting it, and signed his name at the end of the entry. The effect of these entries was found to be to prejudice the driver with other cab proprietors, to the knowledge of the foreman who made the entries. At the hearing of a summons against the proprietor for defacing the licence, the driver called two cab proprietors who said

METROPOLIS—*continued.*
that they should refuse to employ a driver producing a licence so marked; but no evidence was given that he had actually asked for employment and been refused it:—*Held*, that the entries were not made in compliance with 6 & 7 Vict. c. 86, s. 8, but amounted to a defacement of the licence; that such defacement was a "matter of complaint" within the meaning of s. 22 of that Act, over which a metropolitan police magistrate had jurisdiction, and that there was evidence of loss or damage upon which the magistrate could award compensation to the driver. NORRIS *v.* BIRCH - - - - - - 639

8. —— *Sanitary Authority—Duties and Liabilities—Removal of Street Refuse—Liability to Action for non-removal of Snow—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 29.] Sect. 29 of the Public Health (London) Act, 1891, which imposes on the sanitary authorities of London the duty of removing street refuse from the streets within their respective districts, does not give any right of action to a person suffering special damage from a breach of such duty. SAUNDERS *v.* HOLBORN DISTRICT BOARD OF WORKS [64

MILK—Churn—False or unjust measure - 240
See WEIGHTS AND MEASURES.

MINE—*Coal Mines Regulation Act*, 1887—*General Rules—Examination of Machinery, &c.—Report of Result of Examination—Record of Report* —50 & 51 *Vict. c.* 58, *s.* 49, *r.* 5.] By the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 5, a competent person appointed for the purpose shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, &c., in mines, and shall, once at least in every week, examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination, and every such report shall be recorded in a book to be kept for the purpose:—*Held*, that this rule requires a report to be recorded of the examination directed to be made once in every twenty-four hours, as well as of that directed to be made once in every week. SCOTT *v.* BOULD - - - - - - 9

—— Coal—Purchase by railway company of all subjacent strata except coal—Right of owner of coal to compensation before the commencement of working coal mine
See RAILWAY. 2. [459

MISTAKE—*Money paid under Compulsion of Law —Withdrawal of Proceedings before Judgment—Action for Recovery of Money.*] The rule that money paid under compulsion of legal process cannot be recovered back applies although the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the money.—Dictum of Lopes L.J. in *Caird* v. *Moss* (33 Ch. D. 22, 36) explained.—The defendants issued a summons against the plaintiff, under the Metropolis Management Acts, to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a

MISTAKE—*continued.*
street in the district of the defendants. The plaintiff paid the money before the summons was heard, and the summons was withdrawn. The plaintiff having discovered that his premises did not abut on the street in question, brought an action to recover back from the defendants the amount paid by him:—*Held*, that, the money having been paid under compulsion of legal process, could not be recovered back. MOORE *v.* VESTRY OF FULHAM - - - C. A. 399

MONEY HAD AND RECEIVED—Mistake—Money paid under compulsion of law—Withdrawal of proceedings before judgment - - - - - 399
See MISTAKE.

MORTGAGE—*Attornment Clause—Death of Mortgagor—Occupation and Payment of Interest by Heir-at-Law—Bankruptcy of Heir-at-Law—Distress by Mortgagees under Attornment Clause.*] A mortgage contained the usual attornment clause, and the mortgagor, who was in occupation of the mortgaged property, attorned tenant to the mortgagees, and during his life paid the interest on the mortgage. The mortgagor died intestate, and his heir-at-law entered into possession of the mortgaged property, and for a time paid the interest under the mortgage, but subsequently became bankrupt. The mortgagees having distrained for arrears of interest, on the ground that they were entitled to do so as landlords under the attornment clause:—*Held*, that as the original tenancy was determined by the death of the mortgagor, and a new tenancy was not created between the mortgagees and the heir-at-law by mere payment of interest, the distress was illegal, and that the trustee in bankruptcy was entitled to the proceeds of the distress.—*West* v. *Fritche* (3 Ex. 216) distinguished. SCOBIE *v.* COLLINS [375

MUNICIPAL CORPORATION — Alderman — Amotion, power of - - - 571
See DEFAMATION. 3.

NEGLIGENCE — *Damage — Remoteness.*] The plaintiff delivered to the defendant a mare to be agisted in a field, which was separated by a wire fence from another field in the occupation of a cricket club. Owing, as was alleged, to the negligence of the defendant's servant in leaving open a gate between the two fields, the mare escaped from the field in which she was placed into the cricket field; whereupon certain members of the club endeavoured in a careful and proper manner to drive her back through the gate. The mare refused to go through the gate, and having run against the wire fence fell over it, and was injured by one of the iron standards:—*Held*, that the injury to the mare was the natural consequence of the gate having been left open, and that the defendant was liable. HALESTRAP *v.* GREGORY [561

—— Bill of exchange — Alteration — Duty of acceptor—Accepting bill which gives facilities for alteration—Stamp of larger amount than necessary—Estoppel 536
See BILL OF EXCHANGE.

NEGLIGENCE—*continued.*

—— Master and servant—Extent of servant's authority—Sudden emergency—Implication of authority to employ substitute *See* MASTER AND SERVANT. 3. [557

—— Nuisance—Injury—Absence of direct evidence as to cause of — Contributory negligence—Burden of proof - 199
See NUISANCE.

NOTICE TO QUIT—Landlord and tenant—Yearly tenancy—Commencement of tenancy *See* LANDLORD AND TENANT. 8. [378

NUISANCE—*Injury—Absence of Direct Evidence as to Cause of—Contributory Negligence—Burden of Proof.*] The defendants were the owners of a low wall, eighteen inches high, immediately abutting upon a public highway. On the top of the wall was a row of sharp spikes which, as the jury found, was a nuisance to the highway. The plaintiff, a little girl, was found standing on the highway by the wall with her arm bleeding from a wound, such as might have been caused by her falling upon the spikes. No person witnessed the accident. The plaintiff sued the defendants for damages for the injury sustained. At the trial the plaintiff was not called as a witness, nor was any other evidence than the above given as to how the accident happened, except that of a witness who shortly before the accident saw the plaintiff climbing up upon the wall and told her to get down, which she did:—*Held*, that there was evidence to go to the jury that the nuisance was the cause of the plaintiff's injury. FENNA *v.* CLARE & Co. - - - - - - 199

—— Criminal law—Keeping a "brothel" 607
See CRIMINAL LAW. 3.

—— Drain—Single drain connecting different houses with public sewer—Liability to repair - - - - 685
See LOCAL GOVERNMENT. 3.

—— Offensive trade—Notice to abate—Condition precedent to complaint - - 912
See LOCAL GOVERNMENT. 8.

PARLIAMENT—*Borough Vote—Part of a House separately occupied as a Dwelling—Exclusive Occupation of Cubicle in Dormitory—41 & 42 Vict. c. 26, s. 5.*] A policeman had the exclusive occupation, by virtue of his service, of a cubicle in a dormitory at a police barrack. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by a partition seven feet high, but there was a space of five feet between the top of the partition and the ceiling. The policeman kept the key of his cubicle, and was entitled to lock it up at any time:—*Held*, that the cubicle was not "part of a house separately occupied as a dwelling" within the meaning of 41 & 42 Vict. c. 26, s. 5, and that the policeman was not entitled to the franchise in respect of it.—*Stribling* v. *Halse* (16 Q. B. D. 246) commented on. BARNETT *v.* HICKMOTT 691

2. —— *Franchise—Borough Vote—Duplicate Entries—Elector's Notice of Selection—Validity of Notice—Appeal from Revising Barrister—Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *ss.* 17, 18, 39, 42—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 14—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 5, *and Sched.* 3, *Form* (*P*)—*Registration Order*, 1889, *Sched.* 3, *Form* (*P*).] No appeal lies from a decision of a revising barrister upon the validity of a notice given by an elector, under the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 14, in the case of duplicate entries of his name upon the list of voters for a borough, selecting the entry to be retained for voting. THE QUEEN *v.* REVISING BARRISTER OF BOROUGH OF LIVERPOOL AND CHADWICK - 155

3. —— *Franchise—Registration—Old Lodgers' List—Claim—Mistake—Power of Amendment—Revising Barrister — Discretion — Omission of Name of Parliamentary Borough in Claim—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 28, *sub-s.* 2.] A claim to be on the old lodgers' list of voters was duly sent in to the overseers of a parish within a parliamentary borough. The claim followed the statutory form applicable to old lodger claims in all respects, except that the name of the parliamentary borough was omitted. In the declaration accompanying the claim the claimant stated that he was on the register of parliamentary electors "for the said parliamentary borough" in respect of the same lodgings. The overseers duly published the claim in the list of old lodger claimants. On its coming before the revising barrister he refused to amend by inserting the name of the borough, and expunged the claimant's name from the list:—*Held*, that the omission of the name of the borough was a mistake which the revising barrister had power to amend, and ought to have amended, under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878. TREADGOLD *v.* TOWN CLERK OF GRANTHAM 163

PARTNERSHIP—*Liabilities—Separate Debt of Partner—Judgment Creditor—Execution—Foreign Firm—Branch Office in England—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.] Sect. 23 of the Partnership Act, 1890, which enables a judgment creditor of a partner to obtain a receiver of his interest in the partnership business, applies to a foreign firm having a branch house of business in England. BROWN, JANSON & Co. *v.* HUTCHINSON & Co. - - - C. A. 737

—— Presumption of continuance of—Admission —Separable statements - - 390
See EVIDENCE.

PAUPER—Appeal in formâ pauperis—Special leave—Security for costs - - 207
See PRACTICE. 9.

PAYMENT INTO COURT—Liability not denied in defence—Verdict for smaller amount —Payment out of court to defendant—Power of judge to make order - 209
See PRACTICE. 10.

—— Libel — Newspaper—Verdict of smaller amount — Payment out of court to defendant - - - 211, n.
See DEFAMATION. 2.

PERJURY—Materiality of statement - 797
See CRIMINAL LAW. 4.

PETITION—Bankruptcy—Amendment—Adding petitioning creditors — Time within which creditors may be added - 194
See BANKRUPTCY. 13.

—— Bankruptcy—Petitioning creditor's debt—Judgment obtained by compromise—Power of Court to go behind compromise and judgment - - 404
See BANKRUPTCY. 15.

—— Bankruptcy—Petitioning creditor's debt—Merger in judgment — Existence of original debt for purpose of bankruptcy proceedings - - - - 189
See BANKRUPTCY. 14.

PICTURE—Copyright—Artistic work produced in a foreign country—Infringement of copyright in England—Right of owners to sue without registration in England
See INTERNATIONAL COPYRIGHT. [347

PILOTAGE—Compulsory - - - 566
See SHIP.

—— Unqualified pilot—Justices—Hearing of Summons—Interest—Disqualification
See JUSTICES. [563

POLICE—Cost of pay and clothing—Borough maintaining separate police force—Constables added from another force—Contribution by county council - 805
See LOCAL GOVERNMENT. 9.

POLICE CONSTABLE — Licensed victualler—Supplying liquor to a constable on duty—Guilty knowledge - - 918
See LICENSING ACTS. 3.

POLICY—Marine—Attachment of risk - 500
See INSURANCE (MARINE). 3.

POOR LAW—*Guardians—Limitation of Time for Payment of Debt—"Commencement of Proceedings before Competent Authority"—Application for Taxation of Costs—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict. c.* 49), *ss.* 1, 4—*Quarter Sessions—Costs—Taxation out of Sessions—Consent—Jurisdiction*.] By the Poor Law (Payment of Debts) Act, 1859, s. 1, any debt, claim, or demand incurred by or become due from the guardians of any union "shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards." By s. 4, "if any person claiming any debt or demand shall commence proceedings in any Court of Law or Equity, or before any justice or other competent authority, within the time hereinbefore limited, . . . and shall, with due diligence, prosecute such proceedings to judgment, or other final settlement of the question, such judgment shall be satisfied by the guardians against whom the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at, after the expiration of the period hereinbefore provided."—An appeal to quarter sessions against an assessment to the poor-rate of premises belonging to the appellants having been allowed with costs, the appellants, within the three months limited by s. 1, applied to the clerk of the peace to tax the costs:—*Held*, by Lord Halsbury and A. L. Smith L.J. (Lindley L.J. dissenting), that this application was not a commencement of proceedings before a competent authority to enforce payment of the costs, and that, subsequent proceedings to enforce payment of the taxed amount having been commenced after the expiration of the three months, the guardians were not liable to pay the amount.—Decision of Charles J. reversed.—*Per* Lord Halsbury and A. L. Smith L.J.: When costs are allowed by an order of quarter sessions, and consent to a taxation out of sessions is not given, no subsequent court of quarter sessions has jurisdiction to order a taxation. MIDLAND RAILWAY COMPANY *v.* GUARDIANS OF EDMONTON UNION [C. A. 357

POOR LAW—*continued.*

2. —— *Guardians—Limitation of Time for Payment of Debt—Costs of Appeal given by House of Lords—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict. c.* 49), *s.* 1.] Where a judgment of the House of Lords directed payment of the costs of the appeal by the guardians of a parish:—*Held*, that a debt became due from them in respect of such costs immediately upon the delivery of the judgment, and not when the judgment was drawn up, or when the costs were taxed; and therefore, after the expiration of the period specified by the Poor Law (Payment of Debts) Act, 1859, from the date of the delivery of the judgment, the payment of the costs could not be enforced. GUARDIANS OF WEST HAM UNION *v.* CHURCHWARDENS, &C., OF ST. MATTHEW, BETHNAL GREEN - - - C. A. 662

3. —— *Relief—Property of Deceased Pauper—Reimbursement of Guardians—Debt due to Executor—Right of Retainer—Poor Law Amendment Act*, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.] The 16th section of the Poor Law Amendment Act, 1849, which gives the guardians power, in the event of the death of a pauper having property belonging to him, to reimburse themselves the expenses of the maintenance of such pauper during the twelve months previous to the decease, constitutes the guardians ordinary, and not preferential, creditors for the amount so expended by them, and the executor of such a pauper is therefore entitled to retain a debt due from the pauper's estate to himself before satisfying the claim of the guardians. LAVER *v.* BOTHAM & SONS. GUARDIANS OF CHESTERFIELD UNION, CLAIMANTS - - - - - 59

4. —— *Settlement—Constructive Residence—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.] A seaman left his wife for the purpose of sailing on a voyage, and with the intention of returning to her on the completion of the voyage. During his absence she removed from the parish in which they were residing at the time of his going to sea to lodgings in another parish, where he joined her on his return:—*Held*, that, in the absence of evidence that the lodgings were taken by the husband's directions, the husband could not be treated as constructively resident there while he was at sea, and that the period that elapsed between his wife's removal there and his return could not be computed as part of a three years' residence by him in the parish so as to confer upon him a settlement in the parish under s. 34

POOR LAW—*continued.*
of the Divided Parishes and Poor Law Amendment Act, 1876. WEST HAM UNION *v.* CARDIFF UNION - - - - - - 766

POOR-RATE — *Appeal — Assessment Committee as Respondents—Consent of Guardians of Union—Costs of Respondents—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 2.] By s. 2 of the Union Assessment Committee Amendment Act, 1864, the assessment committee of a union to which the Union Assessment Committee Act, 1862, applies may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to an appeal to special or quarter sessions against a poor-rate made for any parish contained in the union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given. —An assessment committee, with the consent of the guardians of the union, appeared as respondents in an appeal to quarter sessions. In subsequent appeals, based on the same valuation, and entered and respited at quarter sessions to abide the result of the first appeal, the assessment committee also appeared as respondents, but without obtaining such consent. The appeals were ultimately dismissed, and the appellants were ordered to pay the respondents' costs. On an application for a mandamus to the justices commanding them to order the clerk of the peace to tax the costs of the assessment committee:—*Held*, that the assessment committee were not entitled to the costs of any appeal in which they had not obtained the consent of the guardians to their appearing as respondents. THE QUEEN *v.* JUSTICES OF ESSEX - - - C. A. 38

PRACTICE—*Appeal—Court of Appeal—Divisional Court—Solicitor and Client—Bill of Costs—Taxation—Judge in Chambers, Order of—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-ss.* 1, 4, 5—*Rules of Supreme Court*, 1883, *Order LIV., r.* 23.] A summons for a review of taxation of a solicitor's bill of costs is a "matter of practice and procedure," in respect of which an appeal from a judge in chambers lies to the Court of Appeal, under s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and not to a Divisional Court under sub-s. 5, or Order LIV., r. 23. IN RE ODDY - C. A. 392

2. —— *Arbitration — Stay of Proceedings — "Step in Proceedings"—Application for Extension of Time—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.] Where defendants had obtained an order for extension of time for delivery of defence:—*Held*, that they had taken "a step in the proceedings" within the meaning of s. 4 of the Arbitration Act, 1889, and were therefore not entitled to apply for a stay of proceedings in the action under that section. BARTLETT *v.* FORD'S HOTEL COMPANY - - - C. A. 850

3. —— *Attachment—Notice of Motion—Affidavit in Support—Service—Rules of Supreme Court*, 1883, *Order XLI., r.* 5; *Order LII., r.* 4.] The copy of the affidavit intended to be used in support of a motion for attachment, which, by

PRACTICE—*continued.*
Order LII., r. 4, is required to be served with the notice of motion, must state that the order is indorsed with the memorandum pointing out the consequence of neglecting to obey it, which is required by Order XLI., r. 5, and, if such statement is omitted, the service is insufficient. STOCKTON FOOTBALL COMPANY *v.* GASTON 453

4. —— *Costs as affected by County Court Acts —Action founded on Tort—Railway Company—Passenger—Personal Injury—Negligence of Company's Servant—Action in High Court—Damages —County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.] An action brought by a railway passenger against the company for personal injuries caused by the negligence, or misfeasance, of a servant of the company, is an action founded upon tort and not upon contract, even though the passenger has taken a ticket; and if the action is brought in the High Court and the plaintiff recovers damages to the amount of 20*l.*, he is not within s. 116 of the County Courts Act, 1888, and is therefore entitled to his full costs of the action.—*Alton* v. *Midland Ry. Co.* (19 C. B. (N.S.) 213) discussed. TAYLOR *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY - - - - - C. A. 134

5. —— *Costs—Action founded on Tort—Railway Company—Passenger — Personal Injury—Negligence of Company's Servant—Action in High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.] An action brought by a railway passenger against the company for personal injuries caused by the negligence of the servants of the company, while he was travelling on their line, is an action founded upon tort, whether the negligence charged is an omission on the part of the servant to do some act that he should have done, or the commission by the servant of some act amounting to a misfeasance.—*Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* ([1895] 1 Q. B. 134) explained. KELLY *v.* METROPOLITAN RAILWAY COMPANY - - C. A. 944

6. —— *Costs—Counsel's Fees—Costs of Three Counsel—Taxation—Railway and Canal Commission.*] Where costs are awarded upon an application to the Railway and Canal Commissioners, the costs of more than two counsel will not be allowed on taxation between party and party, unless the case involves extraordinary complication and difficulty, and is one in which a reasonable and prudent man, acting with ordinary prudence, would not go into Court without three counsel.—In applying this latter test, the chance of counsel being absent should not be taken into consideration; but it should be assumed that all the counsel employed can attend throughout the hearing.—The rule laid down by Fry J. in *Kirkwood* v *Webster* (9 Ch. D. 239) explained. GLAMORGAN COUNTY COUNCIL *v.* GREAT WESTERN RAILWAY COMPANY - - - - R. C. C. 21

7. —— *Discovery in aid of Execution—Judgment Debtor ordered to be examined—Conduct Money—Order XLII., r.* 32; *Order XXXVII., r.* 9—*Attachment—Irregularity—Copies of Affidavits not served with Summons—Waiver—Order LII., r.* 4; *Order LXX., r.* 1.] A judgment debtor, for whose examination an order has been made under Order XLII., r. 32, though entitled to a reasonable

PRACTICE—*continued.*

sum for conduct money, does not come within Order XXXVII., r. 9, and therefore is not entitled under that rule to the "like conduct money and payment for expenses and loss of time as upon attendance at a trial in court."—On an application by the plaintiffs at chambers for leave to issue a writ of attachment against the defendant for disobedience of an order of the Court, the defendant's solicitor took the objection that copies of affidavits, on which the application was founded, had not been served with the summons in accordance with Order LII., r. 4. The judge thereupon offered to adjourn the further hearing until the following day, in order that the defendant might have an opportunity of answering the affidavits: and it was adjourned accordingly. The affidavits were shewn to the defendant's solicitor, who subsequently attended at the adjourned hearing, and admitted that the defendant could not answer the affidavits. The judge then made the order for an attachment:—*Held*, assuming that the provisions of Order LII., r. 4, applied and that there had been an irregularity, nevertheless, by reason of what subsequently happened, the defendant, having accepted what was equivalent to the advantages intended to be conferred by the provisions of the rule, was not entitled to insist on the irregularity, and the order for an attachment was rightly made. RENDELL *v.* GRUNDY - - - - - C. A. 16

8. —— *Equitable Execution—Appointment of Receiver—Equitable Reversionary Interest in Personal Estate—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] The Court has jurisdiction to appoint, by way of equitable execution, a receiver of an equitable reversionary interest in personal estate.—*Fuggle* v. *Bland* (11 Q. B. D. 711) followed. TYRRELL *v.* PAINTON C. A. 202

9. —— *Pauper—Appeal in Formâ Pauperis—Special Leave—Security for Costs.*] A party who has sued or defended in formâ pauperis in the Court below is entitled to appeal as a pauper without either giving security for costs or obtaining special leave so to appeal. BIGGS *v.* DAGNALL [207

10. —— *Payment of Money into Court—Liability not denied in Defence—Verdict for Smaller Amount—Payment out of Court to Defendant—Power of Judge to make Order—Order XXII., r.* 5.] Order XXII., r. 5, directs that, in case of payment into Court when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence; the money paid into Court shall be paid out to the plaintiff on his request, unless the Court or a judge shall otherwise order.—In an action for slander the defendant paid 5*l.* into Court. The plaintiff recovered a farthing damages, and judgment was entered for the defendant with costs. The judge directed that the money paid into Court, less one farthing, should be paid to the defendant. On appeal:—*Held*, that the judge had power to make such an order. GRAY *v.* BARTHOLOMEW - C. A. 209

11. —— *Service out of Jurisdiction—Defendant resident in Scotland—Person out of Jurisdiction a Proper Party to Action—Action of Tort—Discretion—"Comparative Cost and Convenience"*

PRACTICE—*continued.*

of Proceeding within Jurisdiction—Order XI., rr. 1 (*g*), 2.] Order XI., r. 1 (*g*), by which "service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever . . . . any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction" applies to actions of tort, but the jurisdiction so given is discretionary.—Where an action of deceit was brought against three defendants jointly, two of whom were resident in England and one in Scotland:—*Held* (by Lopes L.J. and Rigby L.J., Lord Esher M.R. dissenting), that, as under the circumstances of the case "comparative cost and convenience" were in favour of proceeding against the last-mentioned defendant in England in the same action with the other defendants, not in Scotland where he resided, service of the writ upon him out of the jurisdiction ought to be allowed.—"Comparative cost and convenience" in Order XI., r. 2, means, not the comparative cost and convenience to the person sought to be served only, but to the parties generally. WILLIAMS *v.* CARTWRIGHT - - - - - C. A. 142

12. —— *Service out of Jurisdiction — Application to Set Aside Service—Order XII., r.* 30—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.] An application by a defendant to discharge an order at chambers, made ex parte, giving leave to serve the writ upon him out of the jurisdiction, or to set aside the service, should be made by a summons at chambers, and not by motion in the Divisional Court or in the Court of Appeal. BLACK *v.* DAWSON - - C. A. 848

13. —— *Third Party Procedure—Defendant claiming against co-Defendant — Setting aside Service of Notice—Order XVI., rr.* 52, 55.] When a third party notice claiming contribution or indemnity is given by a defendant to a co-defendant, the question whether there is a case for contribution or indemnity should be raised on the application for directions under Order XVI., r. 52, and not by an application to the Court or a judge to set aside the service of the notice. BAXTER *v.* FRANCE - - - - - C. A. 455

14. —— *Third Party Procedure—Directions, Refusal to give — Discretion — Indemnity — Order XVI., rr.* 52, 55.] In a case where defendants in an action for recovery of land and mesne profits claimed against a co-defendant, from whom they had purchased the land, damages for breach of covenants implied by virtue of the Conveyancing and Law of Property Act, 1881, in addition to indemnity under those covenants, so that all the matters in dispute between them and the co-defendant as third party could not be determined in the action, and where, also, it was a very doubtful question of law whether there was a right to indemnity under the Act:—*Held*, that under the circumstances there was not a question proper to be tried in the action as to the liability of the co-defendant as third party, and therefore a judge at chambers rightly exercised his discretion by refusing to give directions under Order XVI., r. 52. BAXTER *v.* FRANCE (No. 2) [C. A. 591

PRACTICE—*continued.*

15. —— *Writ specially indorsed—Application for Judgment under Order XIV.—Amendment of Indorsement after Summons taken out—Order III., r. 6; Order XIV., r. 1 (a), (b).*] In an action upon a cheque by payee against drawer the indorsement on the writ was in accordance with the form prescribed by Order III., r. 6, with the exception that it did not state that notice of dishonour had been given to the drawer. After taking out a summons for judgment under Order XIV., the plaintiff, without leave, amended the indorsement by adding a statement that notice of dishonour had been given. An order was subsequently made giving leave to enter judgment:—*Held* that, there being a good special indorsement at the time of the adjudication on the summons, the order was rightly made. ROBERTS *v.* PLANT - - - C. A. 597

—— County court—Stay of execution—Sufficient cause - - - - 833
See COUNTY COURT. 3.

—— Execution—Partnership—Separate debt of partner—Judgment creditor—Foreign firm—Branch office in England - 737
See PARTNERSHIP.

—— Injunction—Arbitration—Action impeaching agreement to refer - - 253
See ARBITRATION.

—— Libel—Newspaper—Payment of money into court with defence of apology—Verdict of smaller amount—Payment out of court to defendant - - 211, n.
See DEFAMATION. 2.

—— Maintenance of suit—Action for libel—Reflection on character of person other than plaintiff—Common interest - 339
See MAINTENANCE OF SUIT.

—— Married woman, action against—"Proceeding instituted" - - 873
See HUSBAND AND WIFE.

—— Solicitor—Permitting unqualified person to use solicitor's name in actions, &c.—Punishment—Discretion of Court—Striking off roll - - - 180
See SOLICITOR.

PRINCIPAL AND AGENT—*Personal Liability of Agent—Money obtained for Principal by Duress—Payment by Agent to Principal before Notice of Duress—Receiver appointed under Debenture Trust Deed.*] A trading company executed a trust deed to secure the payment of debentures issued by them. The deed empowered the trustees on the happening of certain events, to enter into possession of the property therein comprised, and to carry on the company's business; to appoint managers, clerks, &c.; and to use the name of the company. It was also provided that, at any time after the right of the trustees to enter upon the mortgaged premises should have arisen, they might appoint a receiver of the property thereby charged, in like manner as if the trustees were mortgagees within the meaning of the Conveyancing Act, 1881. Every receiver so appointed was to have all the powers conferred by that Act, and, in particular, power to exercise any of the powers previously by the deed conferred upon the trustees, and he was to be deemed to be the agent of the company, and as such to be in the same position as a receiver duly appointed by a mortgagee under the Conveyancing Act, 1881:—*Held*, that a receiver appointed by the trustees under this deed, and carrying on the company's business in their name, was a mere agent, and that in so doing he did not incur any personal liability.—The defendant was appointed by the trustees to be receiver, and he carried on the business in the company's name. He opened an account at a bank in the company's name, his own name being added as receiver, and to this account he paid all moneys which he received in the course of the business. The manager of the business, without the knowledge of the defendant, compelled the plaintiffs, under "duress of goods," to pay a sum which the plaintiffs alleged to be extortionate for work which the company had done for them. The money thus obtained was handed over to the defendant as receiver, and was paid by him to the account which he had opened, before he had any notice of the duress:—*Held*, that the payment into the bank was a payment by the defendant as agent to his principals, and that, as it was made before he had any notice of the extortion, he was not personally liable to the plaintiffs.—*Buller* v. *Harrison* (Cowp. 565) distinguished. D. OWEN & CO. *v.* CRONK - - - - - C. A. 265

2. —— *Receiver and Manager appointed by the Court, personal Liability of on Contracts—Construction of Order for Goods signed by Receiver and Manager as such.*] The defendants, who were receivers and managers of the business of a company appointed by the Court, gave an order to the plaintiffs for goods required for the purposes of the business. The order, which was in writing signed by the defendants, was expressed to be given for the company, and the words "receivers and managers" were appended to the signatures of the defendants:—*Held*, that, when receivers and managers of a business appointed by the Court order goods for the purposes of the business, the inference primâ facie is that they pledge their personal credit for the goods, looking for indemnity to the assets of the business; that there was nothing in the terms of the above-mentioned order to rebut that inference; and that therefore the defendants were personally liable for the price of the goods. BURT, BOULTON, & HAYWARD *v.* BULL - - C. A. 276

—— Income tax—Trade exercised within United Kingdom—Assessment in name of agent—"Factor, agent, or receiver having the receipt of profits or gains" - 71
See REVENUE. 6.

PROBATE—Account—Duty—Gift of personal property—Mortgage debt—Possession not assumed by donee to the exclusion of benefit to donor - - - 99
See REVENUE.

—— Duty—Legatees identified by reference to will of another testator—Whether duties under both wills must be paid - 496
See REVENUE. 7.

PROHIBITION — County court — Agricultural Holdings Act, 1883—Compensation for improvements — Arbitration — Counter-notice of claim by landlord - 174
See LANDLORD AND TENANT. 2.

PROOF—Bankruptcy—Scheme of arrangement—Debt provable in bankruptcy - 853
See BANKRUPTCY. 17.

PUBLIC-HOUSE—Licensing Acts - - 616
See LICENSING ACTS. 2.

QUIET ENJOYMENT—Covenant—Duration of covenant - - - - 820
See LANDLORD AND TENANT. 7.

RAILWAY — *Land acquired for Purposes of Undertaking—Line carried over Arches—Temporary letting of Interiors of Arches for purpose of Profit — Implied Powers of Railway Companies.*] A railway company authorized by their special Act to acquire land for the purposes of the railway and works have also the implied power of using land so acquired in any manner which is not an infringement of the rights of other persons and which is not inconsistent with the purposes for which the company was constituted.—A railway company acquired in fee simple, under their compulsory powers, a strip of land on which they constructed a railway carried over a series of arches. The company afterwards let the interiors of the arches for shops and other business purposes to divers persons upon short tenancies, reserving power to resume possession when they deemed it necessary for the purposes of the railway so to do:—*Held*, affirming the decision of Mathew J., that such a letting of the arches was not inconsistent with the purposes for which the company was constituted.—The ratio decidendi of Malins V.C. in *Norton* v. *London and North Western Ry. Co.* (9 Ch. D. 623) disapproved of. FOSTER *v.* LONDON, CHATHAM AND DOVER RAILWAY COMPANY - - - C. A. 711

2. —— *Minerals—Purchase by Railway Company of all subjacent Strata but Coal — Compensation—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77–85.] Where a railway company purchase under their statutory powers some of the underlying minerals as well as the surface of land, the rights and obligations which arise from the purchase as between the company and the owner of the remaining minerals, are determined by the mining clauses (ss. 77–85) of the Railway Clauses Consolidation Act, 1845, not by the common law.—Therefore, where a railway company gave to a landowner notice to treat in respect of certain land, including the minerals thereunder, except coal:—*Held*, that, in the assessment of the compensation payable to the landowner under the notice to treat, he was not entitled to compensation in respect of coal which he would not be able to get without taking away support from, and removing a portion of, the minerals purchased by the company; but that the right to such compensation could only arise upon proceedings under the above-mentioned sections, when the time arrived at which the

RAILWAY—*continued.*
landowner was desirous of working the coal. IN RE AN ARBITRATION BETWEEN LORD GERARD AND LONDON AND NORTH WESTERN RAILWAY COMPANY [C. A. 459

3. —— *Passenger—Fare—Condition on Ticket —Ticket used for Station beyond that at which it is Available—Forfeiture of Ticket.*] The defendant, a passenger on the plaintiffs' railway, took a special excursion ticket entitling her to travel from P. to W. at a fare considerably lower than the ordinary fare; the ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. The defendant travelled to, and returned from, H., a station beyond W., paying the ordinary fare for the journeys between W. and H.; the total amount paid by the defendant was much less than the ordinary return fare between P. and H.:—*Held*, that the condition was applicable to stations beyond that named on the ticket as well as to intermediate stations; that the defendant had used the ticket for a journey to a station other than that named on it, and not merely for a journey to the station for which it was available, and that the plaintiffs were therefore entitled to treat the ticket as forfeited. GREAT NORTHERN RAILWAY COMPANY *v.* PALMER - - 862

4. —— *Regulation—Railway Commissioners—Undue Preference—Home and Foreign Merchandise — Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.] By the Railway and Canal Traffic Act, 1888, s. 27, sub-s. 1, where any railway company charges some traders lower rates than others, for the same or similar merchandise, or for the same or similar services, or makes any difference in treatment, "the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company."—By sub-s. 2, in deciding as to undue preference, the Commissioners may, "in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall . . . . the Commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."—On an application against a railway company alleging undue preference in charging lower rates for foreign than for home merchandise:—*Held*, that the effect of this proviso is not to prohibit all inequalities in rates as between home and foreign merchandise, but that, if the railway company have proved facts which would justify the admitted differences, had the goods in both cases been home goods, the company are not debarred from relying on those facts as an answer, merely because the goods which receive the benefit of the difference are of foreign origin. MANSION HOUSE ASSOCIATION ON RAILWAY TRAFFIC *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY [R. C. C. 927

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—— Bill of sale—Covenant to produce last receipts for rent - - - 900
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—— Bill of sale—Validity - - - 333
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—— Copyright—Literary or artistic work produced in a foreign country—Infringement of copyright in England - 347
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RES JUDICATA—Joint contractor—Guarantee cheque given for liability on—Unsatisfied judgment on cheque—Action against joint contractor on guarantee - 108
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RETURNING OFFICER—Duty—Judicial act—Thames Conservators—Election - 815
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REVENUE—*Probate — Account Duty — Gift of Personal Property—Mortgage Debt—Possession not assumed by Donee to the exclusion of Benefit to Donor—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1.] By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, the description of personal property made subject to account duty under the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*a*), "shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise":—*Held*, that it is not necessary, in order to bring a case within the above enactment, that the benefit to the donor should be by way of reservation out of the subject-matter of the gift.—Certain hereditaments had been mortgaged to the defendant's father, to secure a loan. The sum of 23,924*l.* remaining due upon the mortgage, by a deed made between the defendant's father, the mortgagors, and the defendant in 1886, it was witnessed that, in consideration of 575*l.* paid by the defendant to the mortgagors, and in further consideration of the covenant on the part of the defendant thereinafter contained, such covenant being accepted by the defendant's father in satisfaction of his mortgage debt, from which he thereby released the mortgagors and the defendant, the mortgagors and the defendant's father conveyed the mortgaged hereditaments to the defendant in fee simple, discharged from the mortgage debt, and the defendant covenanted to pay to his father an annuity of 735*l.* during his lifetime. The defendant's father died in 1890 leaving a will which was duly proved:—*Held*, that the transaction carried out by the deed was a "gift" of the mortgage debt to the defendant by his father within the meaning of the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1; and that bonâ possession thereof had not been "assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of the section; and, therefore, that account duty was payable under s. 38 of the Customs and Inland Revenue Act, 1881, upon the property so given. ATTORNEY GENERAL *v.* WORRALL - - - - C. A. 99

2. —— *Account Duty—Marriage Settlement of Widow—Children of First Marriage—Voluntary Disposition—Voluntary Settlement—Volunteers—Customs and Inland Revenue Acts*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.] By s. 38 of the Customs and Inland Revenue Act, 1881, stamp duties are imposed on the personal property of deceased persons to be included in accounts directed to be delivered, including by sub-s. 2 (*a*) any property "taken under a voluntary disposition made by any person dying after June 1, 1881, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bonâ fide made three months before the death of the

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deceased," and including by sub-s. 2 (*c*) any property "passing under any past or future voluntary settlement," made by any person so dying, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor. By s. 11 of the Customs and Inland Revenue Act, 1889, the above-mentioned period of three months is altered to twelve months, and the expression "voluntary settlement" is made to include any trust in favour of a volunteer, whether the deed or instrument affecting the settlement was made for valuable consideration or not as between the settlor and any other person.—A widow, who was the owner of a business which she proposed to transfer to a company, married again, and by her marriage settlement it was provided that of the 19,500 fully paid-up shares which were to be the consideration for the transfer of the business, 1000 should be allotted to each of her four adult sons by her former marriage, 3200 shares should be allotted to the trustees of the settlement in trust for two infant sons and two married daughters by her former marriage, and the remaining 12,300 shares should be allotted to the trustees in trust to pay the income to the settlor for life, subject to a life annuity to her husband, and after her death in trust for those of her children by her former marriage in whose favour she should execute a power of appointment under the settlement. The company was duly registered, and the shares allotted in accordance with the provisions of the settlement. The settlor died less than five months after the execution of the settlement:—*Held*, that the children of the first marriage were not to be treated as volunteers, and that account duty was not payable upon any of the shares comprised in the settlement either as being taken under a voluntary disposition or as passing under a voluntary settlement. ATTORNEY GENERAL *v.* JACOBS-SMITH - - - - - 472

3. —— *Income Tax—Company resident in the United Kingdom—Railway in Foreign Country—Trade carried on partly in United Kingdom, partly Abroad—Profits earned Abroad not remitted to United Kingdom—"Foreign Possessions"*—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D, Cases* 1 *and* 5—16 & 17 *Vict. c.* 34, *s.* 2.] A company registered under the Companies Acts, whose registered office was in London, were the proprietors of a railway in Brazil. The working of the railway was under the control and direction of, and the business of the company was managed by, the directors in London. The directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the railway. The accounts were kept and the balance-sheets and reports were made out in London, where also the meetings of the company were held, and all dividends were declared and paid. With the exception of certain small amounts for transfer fees and annual interest on money, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers and goods on the railway, and other matters connected with the railway:—*Held*, that, the business of the company being partly carried on in the United Kingdom, the company were assessable to income tax, under the First Case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the balance of the profits or gains of their business, and not, under the Fifth Case, only upon the full amount of the actual sums annually received in the United Kingdom.—*London Bank of Mexico and South America* v. *Apthorpe* ([1891] 2 Q. B. 378) followed.—*Colquhoun* v. *Brooks* (14 App. Cas. 493) distinguished. SAN PAULO (BRAZILIAN) RAILWAY COMPANY *v.* CARTER - - - - - C. A. 580

4. —— *Income Tax — Exemption — Public Library—Urban Authority—"Building the Property of a Literary or Scientific Institution"—Public Libraries Act*, 1892 (55 & 56 *Vict. c.* 53), *ss.* 4, 11, 12, 14—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *No. VI.*] A public library vested in a library authority under the Public Libraries Act, 1892, is not "a building the property of a literary or scientific institution" within the meaning of the Income Tax Act, 1842, s. 61, No. VI., and therefore the authority is not entitled to exemption from income tax in respect of such a library under that section.—So *held* by Lindley L.J. and Rigby L.J., Lord Esher M.R. dissenting. MAYOR, &c., OF MANCHESTER *v.* MCADAM - - - - - C. A. 673

5. —— *Income Tax—Money received for Fine on Renewal of Lease—Direction in Will to Invest in Land—Temporary Deposit in Bank at Interest—Claim of Exemption—"Applied as Productive Capital"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Schedule* (*A*), *No. II., r.* 5.] Money, which had been received by the appellant for fines on the renewal of leases, had been placed at a bank, on deposit at interest, in the names of the trustees of a will, under which the appellant was tenant for life. By the will fines on renewals of leases were to be invested in the purchase of freehold, copyhold, or leasehold property. The money was placed at the bank temporarily, until required for permanent investment, and interest was received on it by the appellant, who paid income tax on such interest.—The appellant claimed exemption from income tax on the money so placed on deposit, on the ground that such money had been applied as productive capital, on which a profit had arisen otherwise chargeable for the year in which the assessment was made, within the meaning of the 5th rule in s. 60, Schedule (A), No. II., of the Income Tax Act, 1842, so as to be exempt under the proviso contained in that rule:—*Held*, that the money on which exemption was claimed, having been temporarily placed on deposit, had not been "applied as productive capital," within the meaning of the rule, and therefore the appellant was not entitled to exemption. LORD MOSTYN *v.* LONDON - 170

6. —— *Income Tax—Trade exercised within United Kingdom—Assessment in Name of Agent—"Factor, Agent, or Receiver having the Receipt of Profits or Gains"—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sched. D—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41–44.] By s. 41 of the Income Tax Act, 1842, "Any person not resident in the United Kingdom . . . shall be chargeable in the name of . . . any factor, agent, or receiver having the receipt of any profits or gains arising

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as herein mentioned and belonging to such person":—R., a wine merchant in France, habitually and to a large extent carried on the business of selling champagne to customers resident in England, through the appellants, whom he employed as his agents in this country to procure orders for his wine from such customers and transmit the same to him in France. The wine so sold was forwarded from France to the customer direct at the customer's risk and expense. The invoices for the wine were made out by R. to the customer in the name of R. as vendor, and were forwarded to the appellants, who forwarded the same to the customer. The purchase-money of the wine was for the most part paid by the customers to R., but a certain amount of it was received for him by the appellants, which, however, did not more than cover their commission and disbursements. All receipts for such moneys, whether paid to R. direct or through the appellants, were forwarded by R. to the customer direct:—*Held*, that R. exercised a trade in the United Kingdom within the meaning of Schedule D of the Income Tax Act, 1853; and that he was assessable in the name of the appellants as his agents under s. 41 of the Income Tax Act, 1842.—*Semble*, the words "having the receipt, &c.," refer only to the word "receiver" in the section, not to the preceding words "factor" or "agent." GRAINGER & SON *v.* GOUGH [C. A. 71

7. —— *Probate and Estate Duties—Legatees identified by Reference to Will of another Testator —Whether Duties under both Wills must be Paid —Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5.] A testator bequeathed his personal estate to his brother, and in case of his death in the testator's lifetime directed that it should go and be paid to his brother's executors or administrators as part of his personal estate as if his brother had survived him and died immediately after him. The testator's brother predeceased the testator, leaving a will under which he appointed executors.—The Crown having claimed, in addition to the probate and estate duties paid by the testator's executors, a second probate duty and estate duty from the executors of his brother's will:—*Held*, that the brother's executors were not chargeable with the duties claimed.—*Lord Advocate* v. *Bogie* ([1894] A. C. 83) followed.—*Perry's Executors* v. *Reg.* (Law Rep. 4 Ex. 27) distinguished. ATTORNEY GENERAL *v.* LOYD - - - 496

8. —— *Stamp—Agreement in Consideration of Fixed Quarterly Payments—Duty on—"Bond, Covenant, or Instrument"—"Lease or Tack"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched.*] By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period,

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so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period, with a duty of 2*s.* 6*d.* for every 5*l.* of the annuity or sum periodically payable.—By an agreement under seal between a theatrical ticket agent and a telephone company for the supply of the means of telephonic communication between the ticket agent's head office and branch offices and other places, the company undertook to erect and maintain in working order the telephonic lines and apparatus, and the ticket agent covenanted to pay by quarterly instalments in advance to the company for the use of the lines and apparatus and for the telephonic communication an annual sum per line, the minimum amount payable to be calculated on the rent of forty-five lines. The agreement was to continue for ten years, and thereafter from year to year, determinable by either party giving three months' notice in writing, power being reserved to the company to determine it at any time in certain events.—By an agreement under seal between a railway company and an automatic machine company, the former agreed to permit the latter to place automatic machines on the platforms of certain of their stations, the machines to be placed and, until otherwise directed, kept in the positions directed by the railway company; the automatic machine company to pay to the railway company a yearly rent by equal quarterly payments on the usual quarter days. The agreement contained a provision enabling either party to determine it by three months' written notice expiring at any time:—*Held*, in each case, that the agreement did not come within the exception in favour of a "lease or tack," but was chargeable with an ad valorem duty under the head "bond, covenant, or instrument of any kind whatsoever," as being the only, principal, or primary security for an annuity, or for a sum of money at stated periods, for an indefinite period. JONES *v.* COMMISSIONERS OF INLAND REVENUE. SWEETMEAT AUTOMATIC DELIVERY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE - 484

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SALE OF GOODS—*Possession of Goods under Agreement to Purchase—Hire and Purchase Agreement—Sale by Hirer to bonâ fide Purchaser without Notice—Conviction of Hirer for Larceny as Bailee—Revesting of Property in Goods in Original Owner—Order for Restitution—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *ss.* 3, 100—*Factors' Act*, 1889, (52 & 53 *Vict. c.* 45), *s.* 9—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 21, 24; *s.* 25, *sub-s.* 2.] The plaintiff let a piano under a hire and purchase agreement, by which the piano was to remain the property of the plaintiff until all the monthly instalments provided for by the agreement were paid by the hirer. Before all the instalments were paid the hirer sold the piano to the defendant, who bought it in good faith and without notice of any lien or other right of the plaintiff. The hirer was prosecuted by the plaintiff for larceny as a bailee and was convicted. An application by the plaintiff under the Larceny Act, 1861, s. 100, for restitution of the piano having been refused, the plaintiff sued the defendant for conversion of the piano:—*Held*, that, the hirer being a person who had agreed to buy the piano within the meaning of s. 9 of the Factors' Act, 1889, the delivery or transfer of the piano by him to the defendant had the same effect as though he were a mercantile agent in possession of it with the consent of the true owner; that the property in the piano did not, on the hirer's conviction, revest in the plaintiff, and that the defendant had acquired a complete and permanent title to the piano. PAYNE *v.* WILSON - - - - - **653**

SEPARATION DEED—Covenant by husband to pay annuity—Deed without trustee—Covenant by wife not to molest, annoy, or interfere—Adultery by wife—Action for arrears of annuity - - **12**
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SERVICE—Attachment—Notice of motion—Affidavit in support - - - **453**
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—— Out of jurisdiction—Application to set aside service - - - - **848**
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SEWER — Single drain connecting different houses with public sewer—Liability to repair - - - - **685**
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—— "Single private drain"—Drainage of two or more premises - - - **906**
See LOCAL GOVERNMENT. 5.

SHIP—*Compulsory Pilotage District—Unexempted Ship—Qualified Pilot—Pilot for Exempted Ships—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 353—*Order in Council, February* 5, 1873.] By s. 353 of the Merchant Shipping Act, 1854 (see now the Merchant Shipping Act, 1894, ss. 586, 598 (2), 603 (2)), it is provided that "Every master of any unexempted ship navigating within any (compulsory) pilotage district who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship, employs or continues to employ an unqualified pilot to pilot her" shall incur a penalty:—*Held*, that the expression "qualified pilot" must be understood with reference to the class of ship of which the pilot offers to take charge, and that a pilot licensed to pilot exempted ships only is not such a qualified pilot as to render liable to the penalty of the section a master of an unexempted ship who, after the said pilot has offered to take charge of her, continues to employ an unqualified person to pilot her. STAFFORD *v.* DYER - **566**

SHOP HOURS ACT, 1892—Non-exhibition of statutory notice in shop - - **223**
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SLANDER—Words imputing misconduct in a public office—Special damage - **571**
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SNOW—Liability to action for non-removal of snow—Sanitary authority—Metropolis
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SOLICITOR—*Permitting unqualified Person to use Solicitor's name in Actions, &c.—Punishment—Discretion of Court—Striking off Roll—Solicitors Act*, 1843 (6 & 7 *Vict c.* 73), *s.* 32.] *Per Curiam*: Sect. 32 of 6 & 7 Vict. c. 73, which enacts that a solicitor "shall and may be" struck off the roll for certain specified offences, does not give the Court a discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll. IN RE KELLY - - **180**

SOLICITOR AND CLIENT—Bill of costs—Taxation—Judge in chambers, order of—Appeal—Court of Appeal - 392
See PRACTICE.

SPECIAL DAMAGE—Slander—Words imputing misconduct in a public office - 571
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—— "Bond, covenant, or instrument"—"Lease or tack" - - - - 484
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6 & 7 Vict. c. 86, ss. 8, 22 - - 639
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12 & 13 Vict. c. 103, s. 16 - - - 59
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